Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,
Petitioners,

v.

SCOTT GOLDSTEIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Is the Chestnut Ridge Volunteer Fire Company an independently chartered non-profit corporation formed by citizens of the community served by the fire company for the purpose of providing fire protection in the community, which owns its own land, owns its own buildings, owns its own equipment, which elects its own officers, and is self-governing, but which is the recipient of state and local financial contributions, and the members of which are entitled to certain benefits provided the criteria for which are met such as workers' compensation, disability or pension benefits, which is regulated by some statutes, and which is statutorily entitled to act to carry out its primary function, to wit, to protect life and property by entering buildings and extinguishing fire and providing for a safe zone of operation, which pursuant to its By-Laws suspended and terminated the Appellee, performing a function which is traditionally, exclusively the prerogative of the state thereby rendering your Petitioner a state actor mandating that it protect the first and Fourteenth Amendment rights of the Appellee; and, do facts and circumstances of the facts peculiar to this case and to this Petitioner's relationship to its local government and state government provide a basis for the establishment of "a Maryland Rule" with regard to the status of volunteer fire companies throughout the state as state actors.

PARTIES TO THE PROCEEDING

Petitioners

Chestnut Ridge Volunteer Fire Company, its Officers and Directors, Richard Yaffee, Ross McCausland, Harry Kakel, William Newberrey, III, Michael Fox, Eugene Reynolds, Nick Coroneos. Petitioners are individuals and have no corporate affiliations.

Respondent

Scott Goldstein

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JURISDICTION

I. Decision of the United States Court of Appeals for the Fourth Circuit dated July 12, 2000

II. Denial by the United States Court of Appeals for the Fourth Circuit of your Appellants/ Petitioners Petition for a Re-Hearing *En Banc,* dated August 23, 2000, seeking review of the decision of the United States Court of Appeals for the Fourth Circuit dated July 12, 2000. A copy of the Order is included in Appendix B at 53a-54a.

III. Not applicable

IV. 28 U.S.C. §1254
42 U.S.C. §1983
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CONSTITUTIONAL PROVISIONS

United States Constitution - Fourteenth Amendment. See Appendix C at 55a-56a.

STATEMENT OF THE CASE

Appellee was a member of the Appellant/Petitioner fire company. Following Appellee's loss of an election for Captain (the highest line officer position of the Petitioner/Appellant fire company) to another member, Appellee engaged on a course of disruptive conduct ultimately resulting in action of the Executive Committee to suspend Appellee for violation of the By-Laws which action was appealed to the membership of the company and which decision to suspend was affirmed. Thereafter, based on additional misconduct, the Executive Committee of the Petitioner/Appellant terminated the membership of the Appellee from which termination no appeal to the membership was taken. Thereupon, Appellee filed a Complaint in the United States District Court for the Northern District of Maryland alleging your Petitioner/Appellant was a state actor under various established tests, that Petitioner/Appellant had violated his First and Fourteenth Amendment rights, and, that he was entitled to relief pursuant to 42 U.S.C. §1983. Petitioner/Appellant's Motion to Dismiss was denied and discovery was had. Following discovery, both parties filed Motions for Summary Judgment. Your Petitioner/Appellant's Motion for Summary Judgment on the issue of state actor was denied, and your Appellee's Motion on the issue of Petitioner/Aappellant's status as a state actor was granted. Petitioner/Appellant filed a Motion to reconsider the Ruling. The presiding Judge reconsidered the Ruling; however, in a Supplementary Opinion found your Petitioner/Appellant to be a state actor. Petitioner/Appellant sought permission to note a direct Appeal on the issue to the United States Court of Appeals for the Fourth Circuit which request was denied. Thereupon, additional discovery was conducted. Thereafter, both parties filed Motions for Summary Judgment on the question of whether or not the suspension and ultimate

termination by Appellant/ Petitioner of Appellee violated Appellee's First and Fourteenth Amendment rights. The Court granted Appellant/Petitioner's Motion for Summary Judgment on the issue of the suspension and termination, from the granting of which Appellee noted an Appeal on the ultimate issue and Appellant/Petitioner noted an Appeal on the state actor issue in affirming the decision of the District Court on the state actor issue. The United States Court of Appeals for the Fourth Circuit revealed that in its prior decision in *Haavistola v. Community Fire Company of Rising Sun*, 6 F.3rd 211 (1993), it held that whether firefighting is traditionally and exclusively a governmental function is still an open question and determination of whether volunteer firefighting constitutes state action in Maryland is a fact specific inquiry, and that after remand in *Haavistola* a trial was conducted in which a jury returned a verdict finding that the volunteer fire company at issue there was not a state actor. The Plaintiff there did not appeal the verdict and the Court therefore had no opportunity to review the issue, suggesting that the United States Court of Appeals for the Fourth Circuit sought by virtue of the subject action, to establish a "Maryland Rule". Believing that the Court had erred in its Ruling and in the basis for its Ruling, Appellant/Petitioner sought an *en banc* review, following the denial of which the within Petition is brought.

REVIEW OF JUDGMENT OF STATE COURT

Not Applicable

REVIEW OF JUDGMENT OF FEDERAL COURT

The basis for the Federal jurisdiction in the Court of first instance was the application of the First and Fourteenth Amendments to the Appellant/Petitioner through 42 U.S.C. 1983.

ARGUMENT FOR GRANTING WRIT

THAT THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER, AND IN SO DOING HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL DECISIONS DECIDING AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d, 477 (1974), the Supreme Court dealing with the issue of state action repeated:

> "The mere fact that a business is subject to state regulation does not by itself convert its action into that of a state for purposes of the Fourteenth Amendment, nor does the fact that regulation is extensive and detailed as in the case of most public utilities do so. . . . . The inquiry must be whether there is a sufficiently close nexus between the state and the

> challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. . . and detailed inquiry may be required in order to determine whether the test is met.",

citing, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163 (1972).

On the issue of whether or not a private entity is answerable pursuant to U. S. C. 42, §1983, for its acts by virtue of its performance of a public function, the Court in *Jackson*, *supra*, stated that:

> "We have, of course, found state action present in the exercise by a private entity of powers traditionally, exclusively reserved to the state.",

citing *Nixon v. Condon*, 286 U.S. 73 (1932), *Terry v. Adams*, 345 U.S. 461 (1953), *Marsh v. Alabama*, 226 U.S. 501 (1946) and *Evans v. Newton*, 382 U.S. 296 (1966). None of the above cases dealt with fire departments.

In *Flagg Brothers v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed. 2d 185 (1978), the Court dealing with the state function issue recited that:

> "While many functions have been traditionally performed by governments, very few have been exclusively reserved to the state.",

citing *Jackson v. Metropolitan Edison Co.*, *supra*. In *dicta* in *Flagg Brothers, supra*, the Court stated:

". . . We would be remiss if we did not note that there are a number of state municipal functions not covered by our election of cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by states and municipalities than has been the function of so-called "dispute resolution". Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or state may be free to delegate to private parties the performance of such functions and thereby avoid the stricture of the Fourteenth Amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that the resolution should abide the necessity of deciding them."[1]

The *Flagg Brothers* Court went on to state that:

"A state may act through different agencies -- either by its legislative, its executive, or its judicial authority; and the prohibitions of the amendment extend to all actions of the state infringing rights protected thereby.",

and in citing *Virginia v. Rives*, 100 U.S. 313 (1880).

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[1] Traditionally, fire companies do not possess "police" powers which would more closely associate the function of a fire company with government.

> "If the mere denial of judicial relief is considered sufficient encouragement to make the state responsible for those private acts, all private deprivations of property would be converted into public acts whenever the state, for whatever reason, denies relief sought by the putative property owner. . . . This notion is completely contrary to that "essential dichotomy" between public and private acts.",

citing *Jackson v. Metropolitan Edison Co, supra.*

In *Rendell-Baker, et al. v. Kohn, et al.*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed. 2d 418 (1982), in dealing with the issue of state action, this Court held that receipt of public funds does not change decisions into acts of the state, that extensive regulation does not change the private actor's acts into state action, and that for there to be a symbiotic relationship, that there must effectively be a joint venture between the state and a private enterprise. On the issue of public function, the *Rendell-Baker* Court held that the question is whether the function performed has been traditionally the exclusive prerogative of the state, citing *Jackson, supra.*

In *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed. 2nd 534 (1982), in dealing with the state actor issue, the Court there held that extensive regulation does not convert the action of a private action into state action for the purposes of the Fourteenth Amendment; that substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such entity in demonstrating that the state is responsible for decisions made or acts done by the entity in the course of its business. On the issue of state function, the Court in *Blum* held that in order to determine whether or not the nursing home performs a function that has been

traditionally the exclusive prerogative of the state, it must be found that the state is responsible for the special conduct of which the Plaintiff complains . . . by virtue of the exercise of coercive power or significant encouragement, . . . that mere approval or acquiescence is insufficient, . . . and the required nexus between the state and the private party which has exercised "the powers" must be present, citing *Jackson v. Metropolitan Edison Co.. supra*, and *Flagg Brothers, Inc. v. Brooks, supra*.

In cases involving volunteer fire departments, in *Janusaitis v. Middlebury Volunteer Fire Dept., et al.*, 607 F.2d 17 (1979), the Second Circuit in dealing with the issue of the volunteer fire department performing a function that was traditionally the exclusive prerogative of the state and in establishing the required nexus between the volunteer fire company and the state, the Court there found that the fire company performed its firefighting functions pursuant to an agreement with the town promulgated under a state statute authorizing the town to enter into an agreement with the volunteer fire company within the town for the protection thereof from fire on such conditions as financial assistance and observance of the regulations of the board of selectmen, that the municipality indemnified volunteer firemen to the extent of damage for which they became liable in the course of their firefighting duties, that a Connecticut statute provided volunteer firemen shall be construed to be employees of a municipality for the purposes of workers' compensation, that the board of selectmen of the town had the final vote of approval on the person elected by the membership as chief of the fire department, that the fire department occupied land and buildings which were owned by the town free of charge, that the fire department used fire equipment owned by the town, that the town provided funding for fire protection, that the town reimburses the volunteer firemen members of the

company for travel expenses to and from fires, that the volunteer fire company conducted all its activities on the property and building owned by the town free of charge, and that the board of selectmen of the town were statutorily authorized to oversee the operations of the fire department. It was under those circumstances that the Court found state action, under either the symbiotic test or the public function test.

In *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.* 569 F.Supp. 1344 (1983), the United States District Court for the Eastern District of Virginia carefully examined the criteria upon which liability could attach. In examining the symbiotic relationship test, the Court noted that the building from which the rescue squad operates is owned exclusively by the rescue squad. The equipment it uses, likewise is titled in the rescue squad, and found that no symbiotic relationship with any government entity existed. On the issue of state regulation, in relying on the mandates of *Jackson v. Metropolitan Edison Co., supra, Blum v. Yaretsky, supra*, and *Rendell-Baker v. Kohn, supra*, the Court there found that state regulation did not make the challenged action, state action. In examining the issue of public function, that is whether or not the squad performed a function that is traditionally the exclusive prerogative of the state, the Court did not there find that the existence of a tradition such that the rescue squad performed a function that had been traditionally the exclusive prerogative of the state. In examining the issue of public support and in reciting a laundry list of support received, in citing to *Blum v. Yaretsky, supra,* the Court found that even substantial funding of the activities of a private entity did not convert the action into state action and held that there was no showing of either funding regulation or public function sufficient to demonstrate state action.

In *Yeager v. City of McGregor*, 980 F.2d 337 (1993), the United States Court of Appeals for the Fifth Circuit, in dealing with the issue of whether or not the volunteer fire company was a state actor and in referring to the Supreme Court guidelines recited in *Rendell-Baker v. Kohn, supra*, *Jackson v. Metropolitan Edison Co., supra,* and *Blum v. Yaretsky. supra*, the Court there examining the criteria necessary to establish state action, recited that the obligatory review must include a consideration of:

> "the history, the tradition, and the local laws surrounding volunteer fire departments before concluding whether they are state actors".

The Court there additionally held that a Texas statute providing that the town may provide for a fire department hardly established firefighting as an exclusive public function, and that the subject fire department did not appear to perform a power traditionally, exclusively reserved to the state, the statute notwithstanding. In distinguishing the subject volunteer fire company from the Middlebury Volunteer Fire Company in *Janusaitis v. Middlebury Volunteer Fire Co., supra*, even though the Court found that the McGregor Volunteer Fire Department received subsidies from the City of McGregor, that the city furnished the building, two fire trucks and equipment to the fire department, and paid the volunteer firemen a yearly stipend, contributed to a pension and budgeted tax dollars for the volunteer fire company, that its primary resources of revenue were donations and proceeds from an annual barbeque; and, even that though the city approved the constitution and by-laws, that the city exercised no day-to-day management of the volunteer fire company, had no role in the membership decisions of the volunteer fire company, and did not approve the fire chief or the chief engineer of the fire company. The Court held that the

connections between the city (of McGregor) and the McGregor Volunteer Fire Department are not so close as to establish the volunteer fire department's status as a state actor. The Court noted that the City of McGregor did not profit from the existence of the volunteer fire company, never operated its own fire department, and retained no ability to control the McGregor Volunteer Fire Department; and that, the city was not involved in the McGregor Volunteer Fire Department's membership policy and that it did not coerce or encourage the expulsion of the appellant. The Court there acknowledged that:

> " there are a variety of private sector firefighting alternatives and that firefighting is not generally an exclusive government function, that only half of the population of the United States is served by exclusive government fire protection."

In a strikingly prophetic statement, the Court there took the position that:

> "We demur from establishing a broad rule concerning volunteer fire departments in general.",

and that a decision finding a volunteer fire company to be a state actor might:

> " be costly to the thousands of volunteer fire departments around the country that may be needlessly exposed to §1983 lawsuits".

Similarly, in *Haavistola v. Community Fire Company of Rising Sun,* 812 F.Supp. 1379 (1993), Judge Smalkin who there performed a careful analysis of the case before him

pursuant to the tests enunciated by this Court including the symbiotic relationship test, the state regulation test, the government support and funding test, and the public function test, and in addressing the issue of whether a voluntary fire department is performing a function normally governmental in nature, expressed that:

> "Because a function is normally performed by the government does not mean that it is exclusively within the province of the government.",

and expressed that:

> "Neither the town of Rising Sun nor the state of Maryland is so involved in the provision of fire fighting services in the community to make the fire company liable under §1983. Public policy demands that this Court recognize the realities of small community fire department operation. Such companies play a vital role in the communities which they serve, and when possible their continued existence should be encouraged. The law should not treat such volunteer organizations as mini-municipalities forced to make decisions as are required of such local government but without the benefit of legal counsel, training, or the public treasury to satisfy judgments. . . . ".

The facts here are that your Appellant/Petitioner was formed by private citizens seeing the need for protection in their community by incorporating the Appellant/Petitioner as a volunteer fire company as a non-profit corporation to serve the community. That your Appellant/Petitioner elects its own

officers independent of government, manages its operations independent of government, owns its own land, its buildings, and its equipment, independent of government, conducts its operations, supervises its membership, and engages in fundraising activities and other activities exclusive of government.

While there is no question that there is state regulation no different than that addressed in the *Haavistola* case, *supra*, while there is public funding no different than that addressed in the *Haavistola* case, that there has been no showing that either the funding or the regulation has been sufficient to establish your Appellant/Petitioner as a state actor. Additionally, it is clear that while here there are benefits available to individual members of the fire department under certain circumstances; the availability of such benefits is, likewise, insufficient to establish your Appellant/ Petitioner as a state actor. In fact, it is clear that with regard to workers' compensation benefits, that same would be available to your Appellant/Petitioner simply by the purchase by your Appellant/ Petitioner of a workers' compensation policy to provide benefits to its membership without reference to state statute. As to other benefits available to individual firefighters such as disability or death benefits, scholarships for the children of deceased members who lose their lives in the line of duty, and length of service awards, pensions, all same require the happening of a condition precedent prior to the entitlement to the benefit and none such are such that establish your Appellant/Petitioner to be a state actor as said benefits are benefits to the volunteer members and **not** to the company.

Clearly, there is no similarity between the relationship between the Middlebury Volunteer Fire Department and either the town of Middlebury, Connecticut, or the state of

Connecticut, and your Appellant/Petitioner and its community or the state of Maryland.

References to Maryland statutes by such phraseology as "incidents of sovereignty that have been heaped upon Chestnut Ridge"; or, that Chestnut Ridge has been "cloaked with sovereign immunity", or that Chestnut Ridge has been "endowed with police powers traditionally reserved exclusively to the state", do not suffice to demonstrate in favor of the conclusion that your Appellant/ Petitioner is a state actor.

The very existence "traditionally" in Baltimore County, Maryland, of 33 volunteer fire companies all similarly constituted to your Appellant/Petitioner (as opposed to 19 career fire companies' members of the Baltimore County Fire Department), defeats the conclusion that in Baltimore County, Maryland, firefighting has traditionally been the exclusive province of the state. The "learned treatise" relied upon by the Appellee's "expert" clearly established the opposite situation to be true; to wit, that the volunteer fire service in Baltimore County not only pre-dated the County Fire Department, but that the two grew together but separately.[2] Therefore, fire protection in Baltimore County, Maryland, has not been the exclusive province of government.

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[2] Appellant/Petitioner quoted from the Learned Treatise to show that in fact the said Treatise supported the opposite conclusion. Additionally, the Court appears to have overlooked or disregarded Appellant/Petitioner's three experts' opinions addressing that status of the Appellant/Petitioner as a volunteer fire company.

Clearly, there is no indication that there is a symbiotic relationship which exists between the Appellant/Petitioner and Baltimore County, Maryland, in that no single act has been demonstrated which may effectively be defined as a joint venture, the conduct or carrying out of which benefits both your Appellant/Petitioner and Baltimore County, Maryland. The record is devoid of any such evidence.

With regard to the public funding test, the fact that such has already been demonstrated to be insufficient to create state action notwithstanding, here it is clear that while there are public funds available to your Appellant/Petitioner, the record is devoid of evidence as to the amount or extent of public funds which your Appellant/Petitioner receives and in what proportion those funds are to the overall funding required by the Appellant/Petitioner to operate including the funds it raises from its own independent activities.

On the issue of state regulation, even assuming that substantial state regulation might in and of itself be sufficient to create state action, here the record is devoid of any indication of regulation by Baltimore County, Maryland, with the exception of dispatch. Rather, the record here indicates that the volunteer fire company operates completely independently of Baltimore County, Maryland, with the exception of dispatch including supervising activities at the scene of a fire. There is reference in the record to inspections by the Maryland State Firemen's Association; however, that reference is made in the face of the evidence in the record which demonstrates that in Baltimore County, Maryland, the volunteer firemen's association maintains its own standards for its membership, and, even assuming that the Maryland State Firemen's Association would be a state funded organization, which it is not, that the inspections referred to in the record are clearly for the purpose of the threshold issue

of membership in the Maryland State Firemen's Association, and, are not for the purpose of government regulation. The existence of a state Fire Marshal in Maryland demonstrates that it is the office of the state Fire Marshal which makes inspections, and, the record is devoid of evidence that your Appellant/Petitioner either makes inspections or ever made an inspection. In fact, the Baltimore County Fire Department maintains its own Fire Marshal's office for the purpose of making inspections and investigations of fires. It is also here clear, that there is no record showing any requirement by any local or state government with regard to approval of officers or supervision of operations. The existence of state funding with the obligation to account for those funds, is not such situation as can be fairly defined as regulation; rather, same amounts to no more than a reasonable obligation to account for monies received. The record is additionally devoid of evidence that your Appellant/Petitioner ever received any monies through the State Emergency Assistance Trust Fund or what amounts, if any, it received from either Baltimore County, Maryland, or from the state Fire, Rescue and Ambulance Fund. Accordingly, the record is devoid of evidence of regulation of the Appellant/Petitioner.

There being effectively no record to establish state action by virtue of state funding, by state regulation, by symbiotic relationship, or by the performance of a function which has traditionally been the exclusive province of Baltimore County, Maryland, the Court in the Opinion appealed appears to have established as the basis for its findings, the said "incidents of sovereignty heaped upon you Appellant/Petitioner" which have "cloaked your Appellant/Petitioner with police powers reserved exclusively to the state".

Effectively, the reliance upon this situation to create state function, assuming that it is not subsumed within the category of state regulation, might create a new category as yet untitled requiring this Court's review.

In the decision appealed from, the Court can not by reciting the existence of statutes which do not apply to your Appellant/Petitioner, create state action. Article 48A, §181, provides the authority to inspect premises except as to Baltimore County, the right of entry, and the power to maintain order at fires. All sections and subsections of that statute refer to Section A thereof which excludes Baltimore County therefrom.

Reference to Annotated Code of Maryland, Article 87, §49, provides for the appointment of fire police where there are no local police or sheriff's departments in existence. Not only does Baltimore County, Maryland, have a police department, but, Baltimore County, Maryland, also maintains a Sheriff's Department, so that the statutory exclusion eliminates your Appellant/Petitioner from having conferred upon it, or "heaped" upon it, the powers otherwise addressed in the statute. As to §5-604 of the Annotated Code, Article on Courts and Judicial Proceedings, same is an immunity statute which does not define the immunity there granted as specifically applying to volunteer fire companies, nor does same cloak your Appellant/Petitioner with sovereign immunity, nor does the word sovereign appear in the statute. It is also clear that the immunity on the face of the statute is conditional as opposed to absolute.

On the issue of the perception of state of Maryland of the status of your Appellant/Petitioner, the state of Maryland has not ruled in the manner suggested. The case of *Utica Mutual Insurance Co. v. Gaithersburg-Washington Grove Fire*

Dept., Inc., 455 A.2d 987, 991 (1983) was an insurance subrogation case in which the discussion of the Court dealt with immunity and the issue of governmental and proprietary function. The holding in that case was that the appellee did not establish itself as a government agency entitled to tort immunity, and not that firefighting is a governmental function to which immunity would attach if the appellee were a government agency. *Potter v. Bethesda Fire Department* was a worker's compensation case that dealt with the entitlement of a paid firefighter to receive both a pension and worker's compensation benefits and dealt with the issue of quasi public corporations and not "how" the state viewed the conduct and function by the Bethesda Fire Department. In fact, that case acknowledged that in Montgomery County, fire protection was provided by 18 independent fire departments and rescue squad corporations and that same were to remain autonomous and independent corporations. The holding in that case based on the facts of that case, was that Bethesda Fire Department was a quasi public corporation pursuant to the Montgomery County Code but did not enjoy the status suggested in the subject opinion. Neither case cited suggested that the state of Maryland viewed the volunteer fire companies located throughout the state of Maryland to be performing a function traditionally and exclusively the prerogative of the state. What is clear is that each of the cited cases dealt with a narrow issue that was unrelated to the ultimate question and that there is no decision which addresses the status.

Maryland is a sovereign state comprised of multiple sovereign counties and municipalities, each of which maintains a separate and distinct relationship from any other sovereign county or municipality with its citizens. In fact, the record here is devoid of any evidence which establishes the relationship of any volunteer fire company in any municipality or county of the state of Maryland with the government of that

municipality or county, or, in fact, the state of Maryland. No error could be more basic than to attempt to utilize a local personnel issue in a local volunteer fire company in a local jurisdiction, to create a Maryland Rule. The Court in *Yeager v. City of McGregor, supra*, clearly recognized the pitfalls of attempting to establish a rule which would presumptively effect the status of volunteer fire companies around the country, needlessly exposing them to §1983 suits. The pitfall there avoided has clearly here entrapped the Fourth Circuit in its stretch to establish a Maryland Rule

We are here squarely confronted with the classic situation that establishes the right to review before the Supreme Court, because here it appears that there are conflicting opinions by Federal Courts of Appeals, because here it appears that the subject "Maryland Rule" appears to have been judicially legislated on the basis of a long existing desire to create and establish such Rule of which the Court was deprived by the lack of an Appeal in a case six or seven years earlier, and because there is an important issue of Federal law which this Court needs to settle which effects no less than the status of volunteer fire companies throughout the United States.

In *Janusaitis, supra*, the Court there recognized the reality of the relationship to each other of members of a volunteer fire department and the chilling effect looming over its decision when it stated:

> "It would be folly to presume that the functioning of a voluntary fire department would not be seriously impaired if appellant was reinstated by an order of court."

While there is no suggestion here that volunteer fire companies should be the beneficiary of some special rule carved out for them, the fact is that both the Fifth Circuit in *Yeager, supra*, and the Second Circuit in *Janusaitis, supra*, have acknowledged the importance of volunteer fire companies and the functioning of volunteer fire companies and no decision involving petty personnel issues should be the basis for Rule which would have such a chilling effect that volunteers would be turned aside from election to serve when such service might expose them to litigation of the nature of the subject litigation, but, in addition, would serve to create a burden upon the states which by virtue of establishment of a Rule of the nature established in this case and sought to be reviewed, might require that the states find some alternative to volunteer fire companies, the financial burden and impact of which should outweigh the establishment of a Rule based upon the frivolous complaints of an individual who lost an election for captain.

In sending a clear message of caution, this Court stated in 1978 in *Flagg Brothers, supra*, in addressing state actor issues, that the acknowledgment of the possibility of finding state action in private acts requires that the Courts exercise: "caution . . . (to insure that) the resolution should abide the necessity of deciding them.".

Here, we are faced with a decision not only at odds with decisions of other Circuits but which appears to have been the stated product of a desire to establish "a Maryland Rule" without regard to a careful sifting of facts, but, rather, by a helter-skelter seizing upon of anything to justify the stated end and at the same time and in the same process, the ignoring of facts the acknowledgment of which would defeat the decision as made.

Relative to the matter here at issue, and consistent with *Yeager, supra*, a brief review of our history would here be appropriate. Maryland was settled beginning in 1634 when the Ark and the Dove landed at what became St. Mary's City in St. Mary's County, Maryland. Maryland was settled by Catholics seeking religious freedom.

Throughout the years of settling what became the thirteen colonies, dissidents seeking religious freedom and freedom from what they perceived to be an oppressive government flocked to the new world.

Accounting from the time Maryland was first settled, 155 years before the adoption of the Constitution and the formation of the government of the United States of America, the people provided for themselves by virtue of volunteering to fulfill their needs. Most notably, beginning at Lexington and Concord, volunteer militia defended their communities and homes. Likely, by way of example, the Second Amendment provision for the right to bear arms is representative of the natural evolution of the people's expression of their desire to have a *volunteer* militia.

Volunteer fire companies are not a major topic in our American history texts with the exception perhaps of reference to Benjamin Franklin having formed the first volunteer fire company in Philadelphia in the mid 18th century.

During that 150 years, the people were not concerned with issues of government. The people were concerned with surviving and provided for themselves by banding together as groups of volunteers to accomplish their goals. There was no government. The 1789 Constitutional Convention and our resultant Constitution represents a clear statement of the desire of the people; to protect themselves from too much

government, not to mention the "Bill of Rights", the first ten Amendments which are a clear statement of the people protecting themselves from government.

As the country grew, even though some 'settlements' formed governments, fire companies were formed by volunteers even in 'cities'.

The first fire company in Maryland which is historically identifiable, was the Independent Hose Company, a volunteer fire company, in Frederick, Maryland, formed in 1818.

As citizens were forming volunteer fire companies, such were just not a concern of government, probably until cities grew to the extent that the requirements of city life mandated government to address fire protection and probably not until the beginning of the 20th century.

Accordingly, historically, traditionally, fire protection was neither the traditional function of government for some 350 years and never was and is not today the exclusive function of government as witness the fact of the volunteer fire companies continuing to protect their communities and in fact continuing through this day to be formed. A paper declaration by government that it may provide for fire protection does not alter the fact nor the reality.

Some 80% of the emergency services in Maryland is provided by volunteer emergency service providers by some 465 volunteer fire companies; a substantial number of which were formed before there was any local government in the communities they served and continue to serve.

This country's proud tradition is one of volunteerism and the volunteer fire company is a traditional representative entity of this volunteer spirit. To find otherwise is to close one's eyes to the roots of our great society from the Minutemen of Lexington and Concord to the present.

CONCLUSION

The United States Court of Appeals for the Fourth Circuit panel has clearly seized the opportunity presented by the case of *Goldstein v. Chestnut Ridge* to attempt to fulfill their longstanding and stated desire to construct a Maryland Rule defining the status of the Maryland volunteer fire companies. In the Fourth Circuit panel's haste to do so, they have effectively and prohibitively legislated without following the process generally followed by legislatures, that is to have testimony in support of or in opposition to proposed legislation, the fact that the record was devoid of any indication of evidence to support the Fourth Circuit panel's conclusion notwithstanding, but, rather, which seemed to be a hastily pieced-together rationalization to accomplish a stated long-standing goal.

The utilization of the dispute in this case to accomplish those ends is ill chosen because of the subject matter of the case and is, in any event, without support in the record sufficient to reach any of the Fourth Circuit panel's conclusions.

It being clear, nevertheless, that the issue here is one of national import to the volunteer fire services throughout the United States and is therefore of great public concern, and it further being apparent that the Fourth Circuit panel has reached a conclusion which is at odds with the prior decisions

of other Circuits, and the subject matter of the within action being of great consequence, impact and effect to the state of Maryland, then, clearly, this Petition should be granted and the matter ordered to proceed for briefing and argument as is the relief sought hereby.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 12, 2000]

Nos. 99-1089 & 99-1180

SCOTT GOLDSTEIN,
Plaintiff-Appellant,

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY; RICHARD YAFFEE; ROSS MCCAUSLAND; HARRY KAKEL; WILLIAM NEWBERREY, III; MICHAEL FOX; EUGENE REYNOLDS; NICK CORONEOS,
Defendants-Appellees.

SCOTT GOLDSTEIN,
Plaintiff-Appellee,

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY; RICHARD YAFFEE; ROSS MCCAUSLAND; HARRY KAKEL; WILLIAM NEWBERREY, III; MICHAEL FOX; EUGENE REYNOLDS;

NICK CORONEOS,)
Defendants-Appellants.)
)

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, Chief District Judge.
(CA-96-1483-JFM)

Argued: December 3, 1999

Before WILKINSON, Chief Judge, KING, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Judgment affirmed by published opinion. Judge King wrote the opinion for the Court, in which Senior Judge Butzner joined. Chief Judge Wilkinson wrote a separate opinion concurring in part and concurring in the judgment.

OPINION

KING, Circuit Judge:

Plaintiff Scott H. Goldstein appeals the district court's entry of summary judgment in favor of the Chestnut Ridge Volunteer Fire Company ("Chestnut Ridge" or "the company") and the individual members of its Executive Committee, the defendants below. Mr. Goldstein alleges that he was suspended and later terminated from Chestnut Ridge based on the substance of his speech, in violation of the First Amendment. Inasmuch as Goldstein premises his cause of action against this entity and these individuals upon the First Amendment, we must first determine whether Chestnut

Ridge's decisions to suspend and to terminate him were under color of law for purposes of 42 U.S.C. § 1983. If so, we then must ascertain whether the district court properly concluded that Goldstein cannot establish a violation of the First Amendment.

With respect to the first question, we hold that Chestnut Ridge, a volunteer fire department in Maryland, is a state actor. We do so because Chestnut Ridge is: (1) carrying out functions, exercising powers, and benefitting from protections traditionally and exclusively reserved to the state; (2) receiving substantial state assistance; (3) subject to extensive state regulation; and (4) considered to be a state actor by the state itself. In the totality of the circumstances, Chestnut Ridge is a state actor whose actions must comport with the First Amendment.[1]

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[1] U.S. Const. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment has been "incorporated" into the Fourteenth Amendment and thereby made applicable against the states. *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

However, in considering the second issue, we conclude that Goldstein cannot establish a prima facie violation of the First Amendment. Although his speech incorporated matters of public concern, which is protected speech, and although Chestnut Ridge's interests do not outweigh the public interest in the substance of Goldstein's protected speech, Goldstein cannot establish that his protected speech was a substantial factor in Chestnut Ridge's decisions to take adverse employment actions against him. For that reason, we must affirm the district court's award of summary judgment to the defendants.

I.

Mr. Goldstein was suspended from the company on March 15, 1996, by Richard Yaffee, President of Chestnut Ridge, and on March 21, 1996, his suspension was upheld by a vote of the Executive Committee. Goldstein's suspension followed his admitted failure to abide by an agreement to bring complaints to Yaffee before submitting them directly to the Executive Committee. On August 29, 1996, while on suspension, Goldstein was terminated from the company, based on his submission of allegedly false safety certifications on behalf of other company members. On May 10, 1996, after his suspension but before his termination, Goldstein filed this action in the District of Maryland. The case proceeded through discovery and, following the filing of motions and briefs, the district court granted Goldstein partial summary judgment, holding that Chestnut Ridge is a state actor for

purposes of 42 U.S.C. § 1983.[2] *See Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 984 F. Supp. 367, 372 (D. Md. 1997).

The district court, on November 13, 1997, certified the state action issue under 28 U.S.C. § 1292(b), but we declined Chestnut Ridge's petition for an interlocutory appeal. The district court then considered cross-motions for summary judgment on the merits and, on January 7, 1999, held that Goldstein's suspension and dismissal did not offend the First Amendment. Accordingly, the court entered summary judgment in favor of the defendants.

We possess jurisdiction over Goldstein's appeal pursuant to 28 U.S.C. S 1291. Before we may address the merits of Goldstein's First Amendment claim, we first must ascertain whether Chestnut Ridge acted under color of law within the meaning of 42 U.S.C. § 1983.

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[2] On August 21, 1997, the district court entered an initial order relating to the summary judgment motions, which both granted partial summary judgment to Goldstein and certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). Chestnut Ridge then moved to alter or amend the initial order, in response to which the district court rescinded its order insofar as it certified the case for interlocutory appeal. On November 13, 1997, the district court granted the motion to reconsider only to a limited degree (irrelevant for these purposes), re-entered a summary judgment order, and published its opinion.

II.

We review the grant of summary judgment de novo. *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether a party is entitled to summary judgment, the evidence is viewed in the light most favorable to the nonmoving party. *Myers*, 950 F.2d at 167.

III.

A.

With few exceptions, constitutional guarantees, including those of individual liberty and equal protection, "do not apply to the actions of private entities." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991). While this limitation on the reach of the Constitution is fundamental to our federal system, it is not without boundaries. Indeed, were this limitation boundless, states, government agencies, and government officials could avoid constitutional limits and obligations by simply delegating core governmental functions to private actors. This victory of form over substance is not permitted under the guise of federalism; thus, where "governmental authority . . . dominate[s] an activity to such an extent that its participants must be deemed to act with the authority of the government [, the ostensibly private participants are] subject to constitutional constraints." *Id.* at 620.

Mirroring this pragmatic scheme, section 1983 of Title 42 provides, in pertinent part, that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. This statute, promulgated as part of the Civil Rights Act of 1871,[3] provides "the party injured" with a cause of action for violations of constitutional rights by "every person," that is, both private persons and private entities, but liability is imposed only for deprivations carried out under color of law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). "In cases construing section 1983, 'under color' of law has been treated consistently as equivalent to the 'state action' requirement under the Fourteenth Amendment." *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d

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[3]*Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990) ("'Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871. The Act was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment.'") (quoting *Quern v. Jordan*, 440 U.S. 332, 354 (1979) (Brennan, J., concurring in judgment)).

211, 215 (4th Cir. 1993) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).

As the Supreme Court recently reaffirmed, two principles guide state action determinations:

> [S]tate action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

American Manufacturers Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).[4] In this case, our analysis of state action turns on whether Chestnut Ridge and the members of its Executive Committee "may fairly be said to be . . . state actor[s]." *American Manufacturers*, 526 U.S. at 50.

A handful of contexts have been identified in which we can be confident that the conduct of an ostensibly private actor

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[4] As noted by the Supreme Court in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982), the two principles "collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." As discussed below, the official character of Chestnut Ridge and its Executive Committee members precipitates such a merger of these principles here.

is under color of law for purposes of section 1983. The first exists where, "'in light of all the circumstances,' . . . the Government did more than adopt a passive position toward the underlying private conduct." *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 614-15 (1989) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971)); see also *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 217 (4th Cir. 1993). In that situation, a "private party should be deemed an agent or instrumentality of the Government." *Skinner*, 489 U.S. at 614; *see also Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (finding state action where restaurant excluded patrons based on their race, in compliance with local ordinance); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (holding that private entity acts under color of law if private action was "because of a state-enforced custom"). Second, if the state delegates its obligations to a private actor, the acts conducted in pursuit of those delegated obligations are under color of law. *See West v. Atkins*, 487 U.S. 42, 54 (1988) (holding that physician, who treated inmates pursuant to part-time contract, was fulfilling state's Eighth Amendment obligations and therefore acted under color of state law); *see also Andrews*, 998 F.2d at 217. Third, "[o]ne of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, sovereign power." *United Auto Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 906 (4th Cir. 1995). In other words, a private actor is responsible as a state actor if "the function performed [is] traditionally the exclusive prerogative of the State." *Id.* (quotation and citation omitted). Fourth, "private use of . . . challenged state procedures with the help of state officials constitutes state action." *Lugar*, 457 U.S. at 933; *see also Andrews*, 998 F.2d at 217 ("A private party can be

deemed a state actor . . . when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.").

At bottom, the state action determination requires an examination of all the relevant circumstances, in an attempt to evaluate "the degree of the Government's participation in the private party's activities." *Skinner*, 489 U.S. at 614 ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances.") (quotations and citations omitted); *Evans v. Newton*, 382 U.S. 296, 299-300 (1966) ("Only by sifting facts and weighing circumstances can we determine whether the reach of the Fourteenth Amendment extends to a particular case.") (quoting *Burton v. Wilmington Parking Authority* , 365 U.S. 715, 722 (1961)); *see also Hicks v. Southern Maryland Health Systems Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984) ("[T]here is no specific formula for determining state action.") (quoting *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)). In this regard, we have also considered, *inter alia*, (1) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority," *Edmonson,* 500 U.S. at 622 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)); (2) the extent and nature of public assistance and public benefits accorded the private entity, *Edmonson,* 500 U.S. at 621 (citing *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988)); (3) the extent and nature of governmental regulation over the institution, *American Manufacturers*, 526 U.S. at 52; *Haavistola*, 6 F.3d at 215; and (4) how the state itself views the entity, *i.e.*, whether the

state itself regards the actor as a state actor. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974); *Haavistola*, 6 F.3d at 216-17. We must underscore that none of these factors, in isolation, establishes state action. However, in the totality of the circumstances, these factors inform our resolution of state action questions.

In short, "the Court has articulated a number of different factors or tests in different contexts," and the facts "which would convert the private party into a state actor [vary] with the circumstances of the case." *Lugar*, 457 U.S. at 939.

B.

1.

Turning to this case, it is undisputed that Chestnut Ridge is a nonprofit Maryland corporation operating under its own constitution and bylaws; it owns the land and building from which it operates; and it holds title to the engines, hoses, and related equipment employed in its fire suppression and rescue activities. In addition, the company elects its own officers and directors, who are responsible for running the company. These facts notwithstanding, there are numerous circumstances present in this case mandating our conclusion that Chestnut Ridge's personnel decisions are made under color of law.

2.

a.

We first consider the argument raised by Goldstein below: that Chestnut Ridge is performing a function -- firefighting -- that is traditionally and exclusively a governmental function. Although the Supreme Court has not specifically addressed whether fire protection constitutes a traditional and exclusive state action *per se*, the Court's treatment of the issue acknowledges, at the very least, "that fire protection may be an exclusive state function." *Haavistola*, 6 F.3d at 216 n.1. *See Evans*, 382 U.S. at 302 ("A park . . . is more like a fire department or police department that traditionally serves the community."); *Flagg Bros.*, 436 U.S. at 163-64 ("[W]e would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh*[*v. Alabama*, 326 U.S. 501 (1946),] which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution.' Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.").

In that vein, we have identified and discussed, on several occasions, the unique role of firefighters -- without actually resolving whether firefighting is traditionally and exclusively a governmental function. *See Adams v. Bain*, 697 F.2d 1213, 1217-18 (4th Cir. 1982) (reversing dismissal as

premature because fact-specific determination of whether volunteer fire department was state actor could not be made on face of complaint); *Kreiger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770, 773-74 (D. Md. 1984) (noting that "firefighting is traditionally an exclusively public function" but holding that rescue squad was not "engaged in the public function of firefighting"), *aff'd*, 792 F.2d 139 (4th Cir. 1986) (unpublished disposition); *Haavistola*, 6 F.3d at 218-19, 222 (reversing summary judgment granted "on unsubstantiated judicial notice" that volunteer fire departments in Maryland were not state actors and remanding for "fact-intensive determinations");[5] *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 1994 WL 233356, at *2 (4th Cir. 1994) (unpublished disposition) (holding that "the question whether fire fighting is traditionally an exclusive governmental function in Maryland could not be properly decided as a matter of law on the record [there present], but require[d] resolution of genuine issues of fact raised by conflicting historical evidence").[6] From these prior cases, we may distill two themes: (1) whether firefighting is a traditionally and exclusively governmental function is still an open question, and (2) the determination of whether volunteer firefighting

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[5] After remand in *Haavistola*, a trial was conducted in which a jury returned a verdict finding that the volunteer fire department at issue there was not a state actor. *Goldstein*, 984 F. Supp. at 368. The plaintiff did not appeal the verdict, and we therefore had no opportunity to review the issue.

[6] This earlier case "was instituted by Ivan Goldstein, the father of [Scott Goldstein,] the plaintiff in the present action. The case was voluntarily dismissed by the plaintiff after remand." *Goldstein*, 984 F. Supp. at 368 n.1.

constitutes state action in Maryland is a fact-specific inquiry. There is no doubt that, as the district court noted, the current state of law on this issue might be characterized as "perplexing."[7] *Goldstein*, 984 F. Supp. at 369 n.2.

On one hand, it is difficult to conceive of a service associated more closely with the state than the provision of fire protection services; on the other hand, any private citizen may assist in the suppression of a fire without being bound by the First Amendment. However, we need not determine here whether firefighting, in the abstract, is a traditionally exclusively governmental function, because Goldstein has submitted evidence sufficient to establish that firefighting has been exclusively and traditionally the function of the government in Maryland. Among other things, Goldstein's expert -- whose opinion was uncontradicted below -- maintained that "'within a reasonable degree of Maryland historical certainty and probability that fire fighting was traditionally an exclusive public function in Baltimore County, Maryland.'" *Goldstein*, 984 F. Supp. at 371. This expert supported his opinion with "various historical facts," which the district court summarized as follows:

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[7] While we seek to clarify this point below, we pause to note that the district court was correct to make this determination -- whether Chestnut Ridge is a state actor -- as a matter of law. *See Blum v. Yarestsky*, 457 U.S. 991, 997 (1982) (describing "whether there is state action" as one of "several issues of law"). Of course, this determination need not always be made on summary judgment, nor do we mandate that factual disputes underlying this decision be resolved by the court. Rather, the ultimate resolution of whether an actor was a state actor or functioning under color of law is a question of law for the court.

> First, prior to 1881 organized fire protection in the most populous area of Baltimore County, known as "the Belt," had (with one exception) depended upon the services of Baltimore City units from contiguous areas. Second, in 1881 the Baltimore County Fire Department was established. Third, the Waverly Fire Company, the exception just noted, which had been created in 1878 when the county financed the construction of its building and the purchase of its fire equipment, turned over its property to the county's Fire Commissioner when the County Fire Department was established in 1881. Finally, in the years after its establishment the County Fire Department rapidly grew.

Id. Under these facts, the State of Maryland was the exclusive provider of firefighting services until it effectively delegated that function to state-funded private actors. These uncontradicted facts and expert testimony thus clearly establish the first element of the state action determination: Chestnut Ridge has assumed a function -- firefighting -- that has traditionally been the exclusive function of the state.

b.

Insofar as the Supreme Court has admonished the lower courts to examine the totality of the circumstances, *see* cases cited *supra* at 6-7, those circumstances reinforce a finding of state action here. Thus, to the extent that there could be any doubt that Chestnut Ridge is fulfilling functions that have traditionally and exclusively been the province of

the state -- and we have none -- such doubts are assuaged by the incidents of sovereignty that have been heaped upon Chestnut Ridge. For example, the members of Chestnut Ridge have the authority:

> (1) to enter buildings "without liability for trespass" where a fire is in progress or "there is reasonable cause to believe a fire is in progress";
>
> (2) to enter any building near a fire to protect it from fire;
>
> (3) to order any person to leave any building or place in the "vicinity of a fire or other emergency" to protect the person from danger;
>
> (4) to order that caravans of vehicles, crafts or railway cars be detached in the interest of safety; and
>
> (5) to maintain order in the "vicinity of a fire or other emergency" by exerting police powers in the area.

See Md. Code Ann. art. 48, § 181 (1999). In addition members of Chestnut Ridge may be deputized as "deputy sheriffs" and thereby "exercise the powers of such deputies at fires and on the way to and from fires." *See* Md. Code Ann. art. 87, § 49. Further, volunteer fire companies -- including members of Chestnut Ridge -- are immune from civil liability for acts taken in the performance of their duties. Md. Code Ann., Cts. & Jud. Proc. § 5-604 (1999).

c.

Chestnut Ridge thus has been cloaked by the sovereign with immunity and endowed with police powers traditionally reserved exclusively to the state. A private party may not, on one hand, function in the exclusive province of the state, exercise powers reserved to the state, and benefit from protections reserved to the state, while on the other hand, act without regard to the Constitution. We thus are confident that Chestnut Ridge is performing functions and exercising "powers traditionally exclusively reserved to the State." *Andrews*, 998 F.2d at 218 (quoting *Jackson*, 419 U.S. at 352).

3.

In addition to the foregoing, there are other circumstances surrounding the operation and function of Chestnut Ridge that reinforce our finding that it is a state actor. For example, Chestnut Ridge receives substantial assistance from, and is regulated extensively by, the State of Maryland. Indeed, the district court thoroughly explained this aspect of the case as follows:

> Career and volunteer fire companies in Baltimore County are dispatched to fire scenes by a central county dispatcher. The factors considered by the dispatcher in determining whom to call are the location and severity of the fire or emergency event. At the fire scene, volunteer fire companies are sometimes in command over career fire companies, while on

other occasions career and volunteer fire companies share command at the scene.

Chestnut Ridge (like all volunteer fire companies in Baltimore County) is a member of the Baltimore County Volunteer Fire Association ("BCVFA"). The BCVFA requires that volunteer firefighters have certain types of certification and/or training before they fight a fire in the county. These are the same types of certification and training that the Baltimore County Fire Department requires of its career firefighters. If a volunteer fire company's members fail to meet those requirements, the volunteer company will be suspended from the BCVFA. If the volunteer fire company is suspended, the Baltimore County Fire Department will take the volunteer fire company off its dispatch system and will not dispatch that volunteer fire company to fight any fires in the county.

* * *

Article 38A, section 7 of the Maryland Code establishes the Office of the Fire Marshal, whose responsibilities include "the establishment and enforcement of fire safety practices throughout the State, preventive inspection and correction activities, coordination of fire safety programs with volunteer and paid fire companies, and other State agencies and political subdivisions

exercising enforcement aspects, and critical analysis and evaluation of Maryland fire loss statistics for determination of problems and solutions." Md. Ann. Code art. 38A, § 7(b) (1997). In addition, the Maryland State Firemen's Association, a state-funded association, conducts annual inspections of all fire and rescue apparatus, equipment, and facilities. Md. Ann. Code art. 38A, § 46B.

State-funded training is required for volunteer fire company members, and is conducted by the Maryland Fire and Rescue Institute at the University of Maryland, a state institution. Md. Code Ann., Educ. § 13-103 (1997). . . . Chestnut Ridge's ambulance service is required to be licensed under section 13-515 of Maryland's education code. State grants and loans to volunteer fire companies, including Chestnut Ridge, are made through the Emergency Assistance Trust Fund and approved and monitored by State agencies. Md. Ann. Code art. 38A, § 46A.

Volunteer fire departments, including Chestnut Ridge, receive significant portions of their operating revenue from the State of Maryland. For example, Chestnut [Ridge] receives State funding that is appropriated by the State to promote:

> (1) The delivery of effective and high quality fire protection, rescue,

> and ambulance services to the citizens of this State;
>
> (2) Increased financial support for fire, rescue, and ambulance companies by local governments; and
>
> (3) The continued financial viability of volunteer fire, rescue, and ambulance companies given the greatly increased costs of apparatus and other types of equipment.

Md. Ann. Code art. 38A, S 45B. Payments under this statute are made to each county for distribution to fire companies for the purchase of equipment and rehabilitation of facilities. *Id*. Funds distributed to fire companies under this statute are conditioned upon compliance with a requirement that they be audited and copies of the account be submitted to a State agency. Md. Ann. Code art. 38A, §§ 45C-D. Chestnut Ridge receives operating revenue from the State and Baltimore County governments, and uses these funds for items such as insurance, utilities and fuel.

Under Maryland and Baltimore County law, grants and loans are also provided for volunteer fire companies. *See*, *e.g.*, Baltimore County Code §§ 15-161 *et seq.* (1988). Members of volunteer fire companies are covered under State and county benefit plans.

> *See, e.g.*, Md. Ann. Code art. 38A, §§ 42-42B (disability benefits); Md. Code Ann., Lab. & Empl. § 9-234 (1991 & Supp. 1996) (workers' compensation); Md. Ann. Code art. 48A, § 425 (1994) (group life insurance); Baltimore County Code § 23-147 (pensions). Volunteer firefighters are considered on duty for purposes of the Public Safety Officer's Benefit Act. Md. Ann. Code art. 38A, § 45. Volunteer fire companies and firefighters receive several tax benefits and exemptions, *see, e.g.*, Md. Code Ann., Tax-Prop. § 7-209 (1994), and are exempt from paying State and county fees that other private corporations are required to pay. Md. Code Ann., Corps. & Ass'ns § 1-203.1 (1993).

Goldstein, 984 F. Supp. at 369-70.

Of course, "receipt of state funds alone is insufficient to transform private actions into state actions," and state regulation unrelated to the alleged constitutional violation, even if extensive, is not sufficient, in itself, to effect this transformation. *Haavistola*, 6 F.3d at 215 (quoting *Alcena v. Raine*, 692 F. Supp. 261, 267 (S.D.N.Y. 1988)). Nonetheless, substantial state funding and extensive state regulation -- clearly present in this case -- are factors that weigh in favor of a finding of state action.

4.

Another factor relevant to the state actor determination is how the state itself views the entity. In *Jackson*, 419 U.S.

at 353, for example, the Supreme Court relied upon, inter alia, Pennsylvania's view of the unction of an electric company in holding that the provision of electric service did not constitute state action. Similarly, we have recognized that the determination of state action based on the actor's adoption of a "traditionally exclusively government function" "hinges on how a given state itself views the conduct of the function by the private entity." *Haavistola*, 6 F.3d at 218.

In this area, Maryland authority is clear: the State of Maryland regards Chestnut Ridge as a state actor. Maryland courts, for example, have consistently recognized that "firefighting is a governmental function to which immunity would attach if the appellee were a government agency . . . ." *Utica Mut. Ins. Co. v. Gaithersburg-Washington Grove Fire Dept., Inc.*, 455 A.2d 987, 991 (Md. Ct. Spec. App. 1983), *superseded by statute as stated in Chase v. Mayor and City Council of Baltimore,* 730 A.2d 239, 247-48 (1999). This recognition was underscored in *Potter v. Bethesda Fire Dept.*, 524 A.2d 61, 63 (Md. 1987), in which the Maryland Court of Appeals was called upon to decide whether volunteer fire departments in Maryland were "quasi-public corporation[s]." The Court of Appeals defined a quasi-public corporation by reference to 1 W. Fletcher & C. Swearingen, Cyclopedia of the Law of Private Corporations § 63 (1983 Rev. Vol.): "[T]he nature of the business conducted [by a private corporation] may . . . become so affected with a public interest that the corporation thus becomes quasi-public." And, after examining the rights, duties, and public assistance afforded volunteer fire companies, the Court of Appeals concluded:

> These examples of the supervision, oversight and control on the part of the government clearly indicate the peculiarly public nature of the duties performed by the "private" fire corporations in Montgomery County[, Maryland]. They also show that such corporations are, in fact, governmental in nature.

Potter, 524 A.2d at 68-69. In other words, the State of Maryland itself considers volunteer fire companies, like Chestnut Ridge, to be state actors, and although not dispositive, this fact militates in favor of our finding of state action.

5.

One final consideration, often arising in the resolution of state action questions, is whether there must be a nexus between the indicia of state action and the specific acts comprising the alleged constitutional violation. That is, under some of the circumstances set forth above, we have required that the plaintiff establish a connection between the color of law and the alleged violation of the Constitution. In *Skinner*, for example, a railroad's act of testing a group of employees for the presence of drugs or alcohol was held to be under color of law because there was a direct nexus between the testing and federal regulations authorizing the railroad's testing. *Skinner*, 489 U.S. at 615-16.

There are, however, different considerations at stake once it has been determined that an actor is carrying out functions traditionally and exclusively reserved to the state.

We thus conclude that when it has been established that the State has empowered, or is permitting, a private actor to homestead on territory that has heretofore been the exclusive, traditional province of the State, there need be no specific demonstration of a nexus to the alleged constitutional violation. We previously recognized that requiring such a nexus under these circumstances would represent an untoward leap of logic: "If the [actor] were held to be performing a public function for purposes of state action doctrine, then it would be difficult to conclude that personnel decisions reached during the performance of that public function were not subject to constitutional strictures." *Andrews*, 998 F.2d at 219 n.1; *see also supra* note 4.

We believe the logic of *Andrews* -- that no nexus is required under these circumstances -- is correct. The "public function" test is so "carefully confined" that we need not worry that the absence of a nexus requirement will subject actors to inappropriate liability as a state actor. *See Flagg Bros.*, 436 U.S. at 163. Indeed "[s]tate action via the private exercise of public functions . . . has been found in only narrow circumstances." *Andrews*, 998 F.2d at 218. Thus, Chestnut Ridge may be held liable as a state actor without the demonstration of a nexus -- a connection between the indicia of state action and the specific acts comprising the alleged constitutional violation -- that has been required in other contexts.

6.

We thus hold today that Chestnut Ridge, a volunteer fire department in the State of Maryland, is a state actor. Our conclusion is consistent with and supported by the holding of

the Second Circuit in *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 25 (2d Cir. 1979). There, our sister circuit held, under similar circumstances, that a Connecticut volunteer fire department was a state actor for purposes of section 1983. In that case, the Second Circuit carefully examined all of the circumstances present, including: (1) the "indicia of state involvement"; (2) the functions carried out by the actor; (3) the nature of the relationship between the state and the actor; and (4) the powers and authorities that had been conferred upon the actor by the state. *Id.* at 20-25. In all the circumstances, and under several then-articulated "test[s]," the court held that the volunteer fire department was a state actor. *Id.* at 25. In short, the totality-of-the-circumstances approach applied in *Janusaitis* is correct, and under that approach, Chestnut Ridge is functioning under color of law.

We note that the Fifth Circuit applied a different rationale in reaching a contrary holding in *Yeager v. City of McGregor*, 980 F.2d 337, 343 (5th Cir. 1993). There, the court conducted a"fact-specific review" of the "history, tradition and local law surrounding volunteer fire departments" in Texas, and it applied the"'exclusive' public function" test in isolation before concluding that the volunteer fire department at issue there was not a state actor. *Id.* at 340-41. We find the *Yeager* decision to be distinguishable--on both its apprehension of the law and in its application of the law to the facts. First, the *Yeager* court applied the "'exclusive' public function" test without consideration of other indicia of state action. In other words, while each of the tests, applied in isolation, may have been insufficient in *Yeager* to satisfy the state action test, had the indicia been properly viewed in their totality, the conclusion of that court may have been different. Moreover, *Yeager* is distinguishable

on its facts, inasmuch as: (1) there was no evidence that firefighting had been exclusively the province of the government in Texas; and (2) the authority in Texas did not support the conclusion that Texas regarded firefighting as an exclusively governmental function. We therefore do not find *Yeager* to be persuasive authority.

To the contrary, where, as here, an actor: (1) carries out a function -- firefighting -- that has traditionally and exclusively been the province of a State; (2) is endowed with powers and protection, including police powers and sovereign immunity, traditionally exclusively reserved to the State; (3) is substantially funded by the state; (4) is extensively regulated by the state; and (5) is considered to be a state actor by the state itself, we conclude that the actor is a state actor. A necessary corollary of our first conclusion -- that Chestnut Ridge's personnel decisions are "under color" of law for purposes of section 1983 – is our holding that those decisions must comport with the First Amendment of the Constitution. We thus turn to the next issue to be considered in this appeal: whether Mr. Goldstein can carry his burden to establish a violation thereof.

IV.

A.

Mr. Goldstein joined Chestnut Ridge as a volunteer firefighter in 1985, and for the next ten years, he sought and was elected to a number of company offices. His rise to power in Chestnut Ridge was curtailed in December 1995, when he lost the election for company Captain. Before Goldstein lost this election, he had been a consistent "letter

writer"; that is, he was constantly writing to the leadership of Chestnut Ridge with his concerns, worries, and complaints. Nonetheless, it is Goldstein's post-election correspondence to Chestnut Ridge between December 1995 and March 1996 that forms the factual underpinning of his appeal. Thus, we review that correspondence in some detail.

1.

In his first relevant post-election correspondence, dated December 17, 1995, to the Executive Committee,[8] Mr. Goldstein alleged that the Captain was responsible for three errors that occurred during a rescue. Among other things, Goldstein asserted that: (1) the Captain had "screamed at people to 'stay back [at the station] and clean' rather than appointing crews," with the result that the crew responding to the emergency was "very inexperienced" and lacking in proper technical knowledge; (2) the Captain left several emergency technicians behind at the station, which "compromised patient care and caused an unnecessary personnel shuffle to attend to the patients"; and (3) the Captain showed "favoritism" by failing to suspend someone who, in violation of company operating procedures, "showed to the scene [of the emergency]" rather than "proceeding to the Station," inasmuch as the Captain had suspended Goldstein for the same conduct. J.A. 827-28. This letter concluded with a request for a formal investigation and a demand for a written response to the three complaints.

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[8] The members of the Executive Committee were Richard Yaffee, Ross McCausland, Harry Kakel, William Newberrey, III, Michael Fox, Eugene Reynolds, and Nick Coroneos.

Three days later, on December 20, 1995, Goldstein sent a memorandum to the Executive Committee identifying the Chestnut Ridge firefighters who had: (1) permitted their cardiopulmonary resuscitation ("CPR") certifications to lapse, and (2) failed to take training required for drivers. Goldstein also maintained that firefighters on the list should not be permitted to "ride the apparatus." J.A. 829.

On the same day, Goldstein sent a second memorandum to the Executive Committee asserting that the Captain had committed several errors on another emergency call. Specifically, Goldstein claimed that the Captain had violated a County operating procedure and a company bylaw by responding to an emergency call with a crew of three, instead of a crew of four, and by failing to notify dispatch "that the engine was responding short crew." J.A. 830. This letter also requested a "full investigation" into the incident. *Id.*

Mr. Goldstein's next letter came two weeks later, on January 4, 1996, when he wrote to defendant Yaffee, President of the Executive Committee. This letter responded to the Executive Committee's apparent rejection of the allegations made in Goldstein's letter of December 17, 1995. In response to that rejection, Goldstein asserted that: (1) the Executive Committee's investigation of his allegations was inadequate and failed to follow the required procedure for investigations; (2) his allegations of safety violations and favoritism were substantiated; and (3) a full investigation should be conducted. Goldstein concluded this letter by underscoring his concern that the Executive Committee had "swept [the issues] under the table" instead of giving his complaints the attention they deserved. J.A. 835.

One week later, on January 11, 1996, Mr. Goldstein sent another letter to Yaffee listing problems Goldstein asserted he had noticed during a recent blizzard. Among other things, Goldstein observed that: "line officers" had failed to adequately stock medical and other supplies; the equipment had been improperly stored; and the Captain's "aloof" response to Goldstein's complaints, coupled with Goldstein's lack of full access to the Engineer's Room (in contrast to other officers who had been permitted access), evidenced favoritism by the Captain. Mr. Goldstein emphasized that these problems were "a detriment to the good of the Company, the safety of our crews/equipment, and the image of the Company in the community." J.A. 832.

During the next week, on January 18, 1996, Mr. Goldstein sent yet another letter to Yaffee raising myriad issues. First, Goldstein requested an investigation into "Jamie Lloyd and Matt Moritz approaching my goddaughter, Dena Gede, at school regarding Company business." J.A. 836. Second, Goldstein informed Yaffee that he had discussed the conduct of the Captain during"the rescue at Park Heights & Walnut Avenues" with representatives of the "Fire Rescue Academy" and the "Volunteer Fireman's Association," and that both representatives had concurred in Goldstein's charge that errors had occurred. *Id.* Third, Goldstein highlighted some potential consequences to the company if the issues relating to"gear and safety" were not addressed promptly. Fourth, Goldstein noted his belief that the rules were not being enforced fairly, inasmuch as his brothers (and one other firefighter) had received warnings for conduct that had been ignored when committed by other firefighters. Fifth, he inquired whether there was any truth to rumors that Yaffee was considering kicking Goldstein (and others) out of the

company. Finally, Goldstein requested that Yaffee investigate whether training requirements were being met by the company. Mr. Goldstein ended this letter by noting that company camaraderie was being undermined by the actions of the newly elected officers, and he made the following request: "I would appreciate it if you would handle this professionally + not allow other members to read *this* letter." J.A. 837 (emphasis in original).

Following transmission of the January 18, 1996 letter, Mr. Goldstein apparently spoke with Yaffee by phone, and on January 19, 1996, sent another letter to Yaffee confirming agreements made during their phone conversation. Among other things, the January 19 letter confirmed that the following steps would be taken: (1) "The Company [would] consistently enforce[] all members taking and using their turnout gear on all fires, rescues and other appropriate situations"; (2) Yaffee would "issu[e] a letter for Mrrs. [sic] Mortiz and Lloyd regarding discussing Company business with my goddaughter"; (3) Yaffee would discuss with the Captain "uniformly enforcing all Company policies"; and (4) Yaffee would address supply issues with the "Line Officers." J.A. 838. In exchange, Mr. Goldstein agreed that he would "*bring any problems to [Mr. Yaffee's] attention for resolution before I resort to any other actions in the future.*" *Id.* (emphasis added).

2.

On March 10, 1996, Mr. Goldstein sent a memorandum to Mr. Yaffee regarding "Members riding illegally." J.A. 840. He noted that "the Line Officers of the Company are ignoring established Baltimore County Fire

Department and *Baltimore County Volunteer Fireman's Association* rules regarding mandatory training for riding members." *Id.* Goldstein also noted that riding members were required to have "a current CPR card; Hazardous Materials Operations; Bloodborne Pathogens; and PAT Tags issued," and he asserted that several riding members were not in compliance. *Id.* Goldstein requested that the Captain be charged with violating the bylaws and that a written report on compliance with the regulations be produced.

The next day, March 11, 1996, Mr. Goldstein sent a copy of this same letter to the Executive Committee. Mr. Yaffee responded on March 15, 1996, by suspending Mr. Goldstein for failing to abide by his agreement, confirmed in Goldstein's January 19 letter (*see* supra at 22) to bring further complaints to Yaffee's attention before resorting to other actions, including further referrals to the Executive Committee. The Executive Committee affirmed the ninety-day suspension, and, on Goldstein's motion, the entire company was presented an opportunity to review and approve the suspension. On a vote of the company, Mr. Goldstein's suspension was upheld.

3.

While on suspension, Mr. Goldstein was terminated in response to certain actions relating to his instruction of CPR classes. Mr. Goldstein allegedly falsified a number of CPR records that he submitted to Chestnut Ridge. Mr. Yaffee was the first to detect the records discrepancy. After hearing the evidence, the Executive Committee voted, on August 29, 1996, to terminate Goldstein.

B.

Based on the uncontested facts set forth above, Goldstein claims that his suspension and subsequent termination abridged his First Amendment rights. The basic First Amendment principles controlling the issue here have long been established. "[A] state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Meyers*, 461 U.S. 138, 142 (1983). "Our task . . . is to seek 'a balance between the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). Just as an employee has a right to speak -- even at work -- public employers have the right to run efficient, functional operations, and we must ensure the proper balance between these competing interests.

In that vein, a public employee must establish several elements to state a claim for deprivation of First Amendment rights flowing from an adverse employment action. "First, to trigger First Amendment protection, the speech at issue must relate to matters of public interest." *Hanton v. Gilbert*, 36 F.3d 4, 6 (4th Cir. 1994) (citing *Connick*, 461 U.S. at 146). Second, the "employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace." *Hanton*, 36 F.3d at 6-7 (citing *Pickering*, 391 U.S. at 568). Third, the employee must establish retaliation of some kind -- that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First

Amendment rights. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999) ("[A] public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment."); *Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990) ("[C]laimant must show that the alleged retaliatory action deprived him of some valuable benefit."); *DiMeglio v. Haines*, 45 F.3d 790, 806-07 (4th Cir. 1995). Finally, the employee must establish a causal relationship between the protected expression and the retaliation: that the protected speech was a "substantial factor" in the decision to take the allegedly retaliatory action." *Edwards*, 178 F.3d at 248; *McVey v. Stacy*, 157 F.3d 271, 277-78 (4th Cir. 1998).

"[T]he order of inquiry may vary with the circumstances of the case." *Daniels v. Quinn*, 801 F.2d 687, 689 (4th Cir. 1986). Insofar as the first three elements are ultimately questions of law that were resolved by the district court in this case, we examine those questions of law first. The fourth factor -- one of causation -- is one of fact, and as such, it will serve as a basis for summary judgment only in those instances when there are no causal facts in dispute. Therefore, we review the issue of fact last.

1.

The first question of law before us is "whether the speech [involved] a matter of legitimate public concern." Chestnut Ridge has never contested that Mr. Goldstein has fulfilled this element. And, in considering this issue, the district court held: "Because Goldstein criticized the actions of public officials and questioned the propriety of actions

taken by a governmental entity, his letters involved a matter of public concern. Indeed, his letters addressed a matter of public safety, which is one of the foremost public concerns imaginable." J.A. 1344-45 (citation omitted). Although we agree with the district court that Goldstein's speech involved matters of public concern, application of the remaining elements mandates a closer examination of the speech at issue.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. We must carefully review the entire record to ensure that matters of internal policy, including mere allegations of favoritism, employment rumors, and other complaints of interpersonal discord, are not treated as matters of public policy:

> To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

Id. at 149. In our inquiry, we seek to determine "whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it

is more properly viewed as essentially a 'private' matter between employer and employee." *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985). This is a subtle, qualitative inquiry; we use the content, form, and context as guideposts in the exercise of common sense, asking throughout: would a member of the community be truly concerned with the employee's speech?

We begin with the content of Goldstein's speech. Our de novo review of the relevant communications evidences that during the relevant period, the correspondence covered the following subjects:

- Twelve allegations of safety violations: J.A. 827-28 ((1) inexperienced crew and (2) insufficient technical training); J.A. 829 ((3) lapsed CPR certificates and (4) inadequate training); J.A. 830 ((5) short crew); J.A. 833-35 ((6) insufficient investigation of safety violations); J.A. 831-32 ((7) insufficient supplies and (8) improperly stored equipment); J.A. 836-37 ((9) inadequate gear on emergency call; (10) failure to stabilize vehicle during emergency call; and (11) failure to enforce training requirements); J.A. 840-41 ((12) crewmembers riding to emergencies without proper training).

- Three allegations related to favoritism by the Captain: J.A. 827 ((1) Captain suspends Goldstein for conduct then later fails to suspend another crewmember for same conduct); J.A. 831-32 ((2) Goldstein denied access to "Engineers room"); J.A. 836-37 ((3) gear policy enforced against some but not others).

- Other complaints: J.A. 836-37 ((1) Goldstein's goddaughter contacted about company business and (2) rumors that Goldstein (and others) were to be terminated from the company).

Thus, Goldstein's "speech" between December 1995 and March 1996 contained three general substantive categories of communication: (1) safety; (2) favoritism; and (3) miscellaneous expressions of other concerns.

Matters relating to public safety are quintessential matters of "public concern." *See Edwards*, 178 F.3d at 247 (noting that police officer's speech, relating to proper use and manner of handling concealed weapons, affected public safety and involved matters of public concern); *Lee v. Nicholl*, 197 F.3d 1291, 1295 (10th Cir. 1999) (holding that employee's memoranda concerning traffic safety at particular intersection was on matter of public concern); *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8th Cir. 1995) ("These statements concerned potential danger to the community's citizens, which surely is a matter of concern to the public and not of some personal interest solely to the speaker."). While the content of Goldstein's speech incorporated matters that were clearly of public concern -- including allegations that safety regulations were being violated, the relevant communications also incorporated matters that are not of public concern, including matters of internal policy, favoritism, and other employment-related matters.

In assessing whether the speech included matters of public concern, we consider next the form of the speech. The

speech with safety-related[9] content was encompassed in letters Goldstein sent to the President and Executive Committee of the company. Notably, Goldstein included requests that his allegations of safety violations not be made known throughout the company. *See supra* at 21. Perhaps more significantly, however, some of the complaints of safety violations were delivered by Goldstein to the Executive Committee in violation of his agreement not to complain directly to the Executive Committee without permitting the company President to first address the concerns. These circumstances notwithstanding, we find that the form of the speech does not diminish the public concern encompassed in Goldstein's speech. We underscore that at the summary judgment stage, we are compelled to view these facts in the light most favorable to Goldstein, and in that light, Goldstein's letters might be seen as a vigorous attempt to press company leadership to address matters deeply affecting public safety. Similarly, the fact that Goldstein did not make his views publicly known does not, in any way, undermine the public concern encompassed in his speech. Indeed, as we recently noted, "[p]ublic employees do not forfeit the protection of the Constitution's Free Speech Clause merely because they decide to express their views privately rather than publicly." *Cromer v. Brown,* 88 F.3d 1315, 1326 (4th Cir. 1996). In short, the form of the speech does not detract from the public concerns encompassed in Goldstein's public-safety related speech.

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[9] We have analyzed the "form" and "context" of the speech whose "content" did not involve matters of public concern, and neither the form nor the context converted those matters into public concerns.

Finally, we review this speech in the context in which it took place. This correspondence was submitted in the wake of Goldstein's election loss for the position of company Captain; indeed, the volume of Goldstein's correspondence attacking the Captain's leadership increased significantly following Goldstein's loss in the election for that very position. One reaction to an election defeat of this kind would be to recommit oneself to the company, seeking to establish a record upon which a future election victory might be found. Another possible reaction to a defeat of this kind is to undermine the victor, thereby attempting to demonstrate for the electorate that an error was made in selecting a less-than-worthy leader. The former reaction seeks to better the company (and may involve matters of public concern), while the latter reaction seeks to second-guess the leadership (which is more likely to involve purely internal matters). Again, however, we are compelled to view this evidence in the light most favorable to Mr. Goldstein. In that light, we simply cannot conclude that he had anything but a good-faith intent to identify safety violations. In short, Mr. Goldstein's allegations relating to public safety, in the form and context in which they were submitted, involved matters of public concern.

2.

Having found that matters of public concern were involved in the speech at issue here, we turn to the second question of law: "[W]hether the degree of public interest in the employee's statement was . . . outweighed by the employer's responsibility to manage its internal affairs and provide 'effective and efficient' service to the public." *Daniels*, 801 F.2d at 690.

Here, we begin with Chestnut Ridge's claimed interest. Chestnut Ridge argues that, as a general matter, its interests in managing its internal affairs -- including promoting efficiency and camaraderie -- outweighs the public interest in this speech. The district court agreed:

> Chestnut Ridge has a legitimate interest in maintaining an orderly and safe work environment. The maintenance of such an environment is itself essential to the public safety. Although Goldstein's safety concerns may have been legitimate -- and Yaffee indicated that some of them were -- the manner in which he raised them was so disruptive to Chestnut Ridge's operation that the Executive Committee felt it was necessary to suspend him for 90 days. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Perhaps more than other public entities, a fire company must have a cohesive work environment. The Executive Committee's response was proportionate to the harm that it reasonably perceived and therefore, in my judgment, was constitutionally justified under the circumstances.

J.A. 1346 (citations omitted). In this vein, Chestnut Ridge generally asserts that it had "an over-riding interest in protecting the safety and security of its members" and that Goldstein's complaints disrupted the company and "put the company in turmoil." Br. for Appellee at 24, 26. Further,

even if the actual disruptions, which are without specific evidentiary support here, were not sufficient to justify suspension, Chestnut Ridge claims that significant disruption would have resulted from Mr. Goldstein's conduct. Because, Chestnut Ridge contends, courts give "substantial deference" to a government employer's predictions of disruption, and state entities should not be sidetracked with "less important concerns," we should resolve this balancing test in Chestnut Ridge's favor. Br. for Appellee at 24-25. We agree that volunteer fire companies have a strong interest in the promotion of camaraderie and efficiency, and we thus accord Chestnut Ridge substantial weight for these articulated interests.

We next evaluate the weight to be given the public concern for public safety expressed in Goldstein's speech. Among other things, the substance of the public concern included allegations that some emergency personnel lacked required training and certifications; that the leadership of the company was overlooking violations of safety regulations; and that the conduct of crewmembers was jeopardizing the safety of the crew and of the public.[10] These allegations were a matter of the highest public concern, and as such, they were entitled to the highest level of First Amendment protection. *See Connick*, 461 U.S. at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.").

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[10] The district court found that Chestnut Ridge's own representatives had conceded that some of Goldstein's concerns were legitimate.

In weighing these two concerns -- that of Chestnut Ridge and that of the public -- however, we must reject the district court's analysis. If a member of the public has knowledge that safety is being compromised by emergency personnel, that person should not be discouraged from so reporting. Therefore, to justify sanctions, including suspension from the company, based on the substance of these concerns, Chestnut Ridge was required to make an extremely strong showing. We agree that state actors -- like the firefighting company here -- have a strong interest in promoting internal harmony, trust, and camaraderie amongst its members. However, generalized and unsubstantiated allegations of "disruptions," and predictions thereof, must yield to the specific allegations made by Goldstein here, which related specifically to the safety of the public. Indeed, any complaint by one firefighter that another firefighter is violating safety regulations is sure to affect "camaraderie" in the general sense. However, to adopt the district court's approach would permit fire companies -- and similarly situated state actors -- to sanction the complaining firefighter based upon unsupported and generalized predictions of"disruptions" caused by the complaints. In the context of a fire company, such a result would effectively endorse a "red line of silence," whereby fire companies, police officers and other entities carrying out crucial public functions are permitted to quash complaints affecting public safety under the general aegis of "camaraderie" and the avoidance of disruptions. We are unwilling to countenance such a blanket immunity; indeed, as one commentator aptly observed:

> [A] firefighter's ability to exercise her First Amendment rights could prove crucial to the safety and welfare of a community. If a

> company is not properly trained, is using outdated equipment, or lacks adequate staffing, the community needs to know about it. In the context of public employment, the Supreme Court has recognized a free-speech easement in government workplaces to facilitate speech concerning matters of public concern. Volunteer firefighters subject to summary discharge or other forms of punishment will think twice before speaking out about problems with the local fire company.

Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations,* 94 Mich. L. Rev. 302, 331-32 (1995). Although today we resolve the balancing test in favor of Goldstein, we emphasize that the inquiry is a particularized one. In other words, we do not hold that a complainant's interest in voicing safety complaints will always outweigh a police or fire department's interest in maintaining morale and efficiency within its ranks. We merely conclude that when the evidence in this case is viewed in the light most favorable to Goldstein, Chestnut Ridge's generalized and unsubstantiated interests, although substantial, fail to outweigh the public's interest in being aware of these safety violations. *See Pickering*, 391 U.S. at 570 ("[T]o the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.").

We next consider whether Goldstein was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights. We need not dwell on this element because it is clearly satisfied here. The Supreme Court has recognized that a failure to hire, a denial of promotion, or denial of transfer may constitute the deprivation of a valuable governmental benefit. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73-76 (1990). The clear import of this holding was that "an adverse employment action did not have to be the substantial equivalent of a dismissal to violate a public employee's rights under the First Amendment." *DiMeglio*, 45 F.3d at 806. It also makes no difference that Goldstein was a volunteer fireman; he has been stripped of the powers, rights, and obligations heaped upon members of Chestnut Ridge. *See supra* at 10-11. Thus, inasmuch as Goldstein was first suspended and later terminated from Chestnut Ridge, we conclude that this element has been satisfied.

4.

Finally, Goldstein bears the burden of demonstrating that his protected speech was a "substantial factor" in Chestnut Ridge's decision to suspend him. *Edwards*, 178 F.3d at 248. The entry of summary judgment necessitates that we review this factor de novo. Mr. Goldstein's burden is thus considerably lighter at this stage of the proceedings, inasmuch as we resolve all factual disputes in his favor. *See Jones v. Dodson*, 727 F.2d 1329, 1337 (4th Cir. 1984) (If the "'evidence raises genuine issues as to the actual reason for an

employee's discharge,' the motivational issue must . . . be resolved by the trier of fact.").

Notwithstanding this standard of review, we must affirm the district court's ruling against Mr. Goldstein because he cannot satisfy his burden of demonstrating that protected speech was a substantial factor in his suspension. In this case, Mr. Goldstein has submitted no evidence, even following the completion of extensive discovery, that the substance of his protected speech was a substantial factor behind his suspension. Left with mere conjecture to this effect, the district court properly awarded summary judgment to the defendants.

At the outset, the record submitted in support of the summary judgment motions clearly evidences that Goldstein was suspended, and later terminated, for reasons unrelated to his allegations relating to public safety. The Executive Committee members, each of whom voted in favor of Goldstein's suspension, articulated a basis for the suspension separate and independent from protected speech. For example, Yaffee testified that he suspended Mr. Goldstein solely because Goldstein sent the letter directly to the Executive Committee on March 11, 1996, in violation of the agreement that Goldstein made on January 19, 1996, under which Goldstein agreed to give Yaffee a chance to remedy any problems before Goldstein would report them to the Executive Committee. Similarly, the other members of the Executive Committee -- Ross McAusland,[11] Henry Kakel,[12] William

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[11] McAusland claimed that he voted to suspend Goldstein based on a number of concerns, for which no formal charges were

Newberrey,[13] Michael Fox,[14] Eugene Reynolds,[15] and Nick Coroneos[16] -- each articulated reasons separate and distinct

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ever filed: (1) sexual harassment liability; (2) expressions of company members who felt unsafe working with Goldstein; (3) Goldstein's insubordination in 1994; (4) Goldstein's turning a mistake by the Captain into "a critique and attack on the [C]aptain" (J.A. 888); (5) Goldstein driving another President out of the company; (6) allegations of Goldstein's use of illegal drugs; and (7) allegations that Goldstein had intimidated other members of Chestnut Ridge.

[12] Henry Kakel testified that his perception was that the company was in a state of "turmoil," and he believed that some of the allegations were "nitpick[y]" and untrue. J.A. 932.

[13] In voting in favor of suspension as a member of the investigating committee that recommended Goldstein's suspension, Newberrey had "hop[ed] that in the 90-day period, that [Goldstein] would cool down a little bit and get over the fact that he didn't make [C]aptain." J.A. 1205. Newberrey also believed that Goldstein had "disrespect[ed] subordinates," J.A. 1214, and "was disrespectful to the senior officers." J.A. 1217.

[14] Fox could only remember that he voted to suspend in reliance on the recommendations of the investigating committee. J.A. 958.

[15] Reynolds stated that he had voted to suspend based on (1) "a pattern of behavior that was disruptive to the company" (J.A. 963); and (2) on the fact that "[t]he great bulk of the accusations were directed to the then captain." J.A. 966.

[16] Coroneos voted to suspend based, *inter alia*, on the "way [Mr. Goldstein] presented detrimental subjects to the good

from Goldstein's protected speech. The theme suggested by each of the voting Executive Committee members was that the substance of Goldstein's protected speech had nothing to do with his suspension.

Inasmuch as explanations legitimizing otherwise prohibited conduct can easily be conjured post hoc, we have reviewed these explanations with a jaundiced eye. Thus, we have reviewed the record to determine whether any reasonable jury could conclude that the articulated reasons for Goldstein's suspension were a pretext for suspension substantially motivated by Goldstein's protected speech; if a reasonable jury could reach this conclusion, then we must remand the case for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that summary judgment is not appropriate "if the evidence is such that a reasonable jury could return a verdict for the non-moving party"). We emphasize, however, that the Executive Committee members need not have been correct in their apprehension of the facts underlying the articulated justifications. On the other hand, those beliefs must have been held honestly and in good faith, and, at this stage of the proceedings, we must be able to discern that the articulated, non-protected-speech-related justifications for the adverse employment actions are not a pretext for retaliation substantially caused by protected speech.

In this case, however, the articulated -- and constitutionally justified -- reasons for the Executive Committee members' individual decisions to suspend

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order of the company," and "his pattern of behavior." J.A. 954.

Goldstein are substantiated by the balance of the record on appeal. For example, it is uncontested that Goldstein's letter of March 11, 1996, violated his agreement with Yaffee to bring all further complaints to Yaffee before presenting them to the Executive Committee. The violation of a prior employment agreement in this manner furnished a clear justification for sanctions, and any such sanction would have been unrelated to Goldstein's public safety related complaints. Further, Goldstein's violation of his agreement with Yaffee was the articulated reason behind the decision of several Executive Committee members to vote in favor of Goldstein's suspension. Thus, to the extent that the violation of his agreement with Yaffee served as the basis of Goldstein's suspension, his suspension would not have been substantially caused by his protected speech.

Similarly, the members of the Executive Committee plainly perceived that Goldstein's complaints sought to undermine the newly elected Captain's leadership instead of raising safety concerns in good faith. On the record before us, this articulated justification is substantiated. As noted above, Goldstein submitted a high volume of complaints against the newly elected Captain immediately following the election. *See supra* at 26-27. While this context does not vitiate the public concern encompassed in Goldstein's speech, it does substantiate the claim that "[t]he great bulk of he accusations were directed to the captain," J.A. 966, and that Goldstein's complaints were "nitpick[y]." J.A. 932.

The other facts surrounding Goldstein's suspension also support Chestnut Ridge. Significantly, Goldstein was not sanctioned until he violated his agreement with Yaffee. Further, Goldstein has never alleged that Chestnut Ridge took

any action with the intent of quashing the substance of his complaints. To the contrary, Mr. Goldstein concedes that Yaffee reacted to his numerous complaints by requiring only that he (Yaffee) be given the first opportunity to respond to future complaints. Had Goldstein's outlet for complaints been shut off, or had there been no clear procedure for lodging such complaints, then the manner in which Goldstein had submitted his public safety related concerns could not have served as a basis for employment sanctions. However, the facts present here -- including the notice of a clear procedure for the lodging of future complaints -- only serve to reinforce the conclusion that the substance of his complaints was not the cause of the employment sanctions.

That the company actually took steps to remedy the problems Goldstein had identified is another fact that supports Chestnut Ridge. That is, as Goldstein concedes, "[a]fter Goldstein made his allegations, Yaffee and Coroneos issued a memorandum to the Executive Committee setting forth the training and/or certification needed by certain members of Chestnut [Ridge]." Br. for Appellant at 21. Acting to remedy the safety problems identified by Goldstein certainly reinforces the testimony of the Executive Committee members that the substance of the Goldstein's allegations was unrelated to the sanctions later imposed.

In response, Mr. Goldstein argues that two facts require reversal: (1) that the letters sent to Chestnut Ridge between December 1995 and March 1996 were the cause of his suspension in March 1996 and (2) that some of the allegations of safety violations contained in those letters were

accurate.[17] Even if true, these allegations do not carry the required burden. What Mr. Goldstein needed to produce was evidence that the protected speech -- the allegations of safety violations -- was a "substantial factor" in his suspension or that the articulated justifications for his suspension were a pretext. He has submitted no evidence to either effect. Instead, his argument is, at base, that because some of his allegations were true, his suspension must have been substantially caused by the allegations. We reject this argument.

In this light, we conclude that no reasonable jury could find that Goldstein's protected speech was a substantial factor in Chestnut Ridge's decision to suspend him. The uncontroverted evidence establishes that Chestnut Ridge suspended Goldstein for other conduct.

5.

In short, having analyzed the "substance, form, and context" of the speech at issue here, we conclude that the communications incorporated both matters of public concern and matters of purely internal concern; that Chestnut Ridge could not have sanctioned Mr. Goldstein for the substance of his protected speech; that he was, in fact, deprived of a benefit; but that as a matter of law, no reasonable jury could conclude that the substance of Mr. Goldstein's protected

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[17] *See, e.g.*, J.A. 1015-20, 1040-41 (Yaffee admitting some allegations were true); J.A. 1104-09 (Coroneos admitting that members lacked required training).

speech was a substantial factor in the decision to suspend him.[18]

V.

Having examined the incidents of sovereignty borne by Chestnut Ridge, we conclude that this Maryland volunteer fire department is, as a matter of law, a state actor. For that reason, Chestnut Ridge is bound by the First Amendment. However, because Goldstein cannot establish that protected speech was a substantial factor in his suspension or dismissal, we affirm the district court's entry of summary judgment in favor of the defendants.

AFFIRMED

WILKINSON, Chief Judge, concurring in part and concurring in the judgment:

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[18] As for his dismissal, Mr. Goldstein argues that the allegations of falsified records were a pretext, and that Chestnut Ridge actually dismissed him based on his speech. The district court disagreed: "Of course if the evidence upon which an employer discharged an employee was so weak as to give rise to the inference that it was pretextual, there would exist an issue of fact to be decided by the jury. That, however, is not the case here where there is sufficient evidence from which the members of the Executive Committee could properly find that Goldstein had falsified records." J.A. 1347. Having concluded that Goldstein's suspension did not violate the First Amendment, we also affirm the district court's finding that there was substantial evidence upon which Goldstein could have been terminated. We therefore affirm the entry of summary judgment on this count.

I am pleased to concur in the majority's opinion except as to Part IV.B.2. The district court correctly found that the fire department's interests in maintaining order and discipline outweighed Goldstein's speech interests under the second step of the *Pickering* balance. Goldstein went to great lengths to disrupt the department by launching a blizzard of complaints immediately upon losing an election for the department's captaincy. The district court properly recognized that Goldstein's behavior was highly detrimental to Chestnut Ridge's ability to perform its essential function of ensuring public safety. I would therefore not reject the district court's analysis on this point. Rather, I would affirm the judgment without reservation.

Police and fire departments cannot effectively protect public safety without some measure of order and discipline in their ranks. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers*, 461 U.S. 138, 151-52 (1983). The district court found that Chestnut Ridge's interests in maintaining an orderly and safe working environment outweighed Goldstein's speech interests.

A number of facts support the district court's conclusion on this point. To begin with, the sheer volume and frequency of Goldstein's complaints give them a scattershot quality. Goldstein submitted letters detailing numerous grievances to President Yaffee or the Executive Committee on at least nine occasions over a period of less than three months. Moreover, this barrage of complaints came fast on the heels of Goldstein's loss of the election for the department's captaincy in December 1995. Further, as

the majority recognizes, a number of Goldstein's concerns related only marginally or not at all to safety. For example, in his January 4, 1996, letter to Yaffee, Goldstein complained about last-minute changes to meeting times and the potential formation of "cliques" at the station, in addition to raising safety issues. In his January 11, 1996, letter to Yaffee, Goldstein complained about having been denied access to the "Engineers room" during his prior tenure as first lieutenant. Indeed, Goldstein's letters were rife with accusations of favoritism on the part of the newly elected captain. This sort of sniping reinforces the conclusion that Goldstein's speech was directed toward disrupting the company and was motivated in part by personal vendetta.

Contrary to the concerns expressed by the majority, the district court's approach does not permit state actors to immunize themselves from the First Amendment with reflexive appeals to"camaraderie." Rather, the district court undertook a particularized examination of the facts of this case, as *Connick/Pickering* requires. *See, e.g., Connick*, 461 U.S. at 142, 150, 154; *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 569 (1968). The district court considered the manner in which Goldstein raised his complaints, as well as testimony concerning the disruptive effect of Goldstein's behavior on the fire department. While acknowledging the great importance of Goldstein's interest in speaking on matters of safety, the district court concluded that, under these particular circumstances, the employer's interests were paramount. Unlike the majority, I would endorse the district court's conclusion on this point.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed August 23, 2000]

Nos. 99-1089 & 99-1180
CA-96- 1483-JFM

SCOTT GOLDSTEIN
Plaintiff-Appellant

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY; RICHARD YAFFEE; ROSS MCCAUSLAND; HARRY KAKEL; WILLIAM NEWBERREY, III; MICHAEL FOX; EUGENE REYNOLDS; NICK CORONEOS
Defendants-Appellees

SCOTT GOLDSTEIN,
Plaintiff-Appellee,

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY; RICHARD YAFFEE; ROSS MCCAUSLAND; HARRY

KAKEL; WILLIAM NEWBERREY, III;)
MICHAEL FOX; EUGENE REYNOLDS;)
NICK CORONEOS,)
Defendants-Appellants.)
)

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/_____
Patricia S. Connor
CLERK

APPENDIX C

AMENDMENT XIV - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxes. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, Civil or military, under the United States, or under any State who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,

Petitioners,

v.

SCOTT GOLDSTEIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Filed January 7, 1999]

No. JFM-96-1483

SCOTT GOLDSTEIN)
Plaintiff,)
)
v.)
)
THE CHESTNUT RIDGE)
VOLUNTEER FIRE COMPANY,)
et al.,)
Defendants.)
)

MEMORANDUM

Scott Goldstein has brought this suit against the Chestnut ridge Volunteer Fire Company ("Chestnut Ridge") and its officers, Richard Yaffe, Ross McCausland, Harry Kakel, William Newberrey III, Michael Fox, Eugene Reynolds and Nick Coroneos, under 42 U.S.C. § 1983. Goldstein alleges that defendants unlawfully disciplined, suspended, and terminated him for exercising his First Amendment rights. Defendants have moved for summary

judgment and plaintiff has moved for summary judgment on the issue of suspension. Defendants' motion will be granted, and plaintiff's motion will be denied.

I.

Scott Goldstein joined Chestnut Ridge in 1985 as volunteer fire fighter. Chestnut Ridge is governed internally by a series of officers elected from the membership of the company.[1] Officers are elected to one-year terms at the end of each calendar year. All individual defendants were officers of Chestnut Ridge during the times relevant to this lawsuit. Goldstein ran for and won a series of elected offices with Chestnut Ridge over the years, including recording secretary and first and third lieutenants. In December 1995, Goldstein ran unsuccessfully for the Captain's position.

In December 1995, Goldstein began writing and submitted a series of letters and memoranda that were critical of Chestnut Ridge's operations and personnel. Goldstein alleged that many volunteer members were not properly trained and/or certified to respond to emergency fire and medical alarms. The first such memorandum, addressed to the Executive Committee and dated December 20, 1995, alleged that certain Chestnut Ridge volunteer members lacked current CPR training. Chestnut Ridge President Richard Yaffe responded to Goldstein's memorandum with a memorandum to the Executive Committee dated December 25, 1995. Yaffe reminded the Executive Committee that any

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[1] In a previous ruling, I ruled that Chestnut Ridge is a state actor for the purposes of § 1983.

member who does not have current CPR training cannot ride the fire trucks.

This exchange was followed by several more critical letters from Goldstein in January 1996. In a telephone conversation with and follow-up letter to Yaffe on January 19, 1996, Goldstein agreed that he would "bring any problems to [Yaffe's] attention for resolution before resort to any other actions in the future." On March 10, 1996, Goldstein again wrote to Yaffe regarding inadequate training and certification of Chestnut Ridge members. Goldstein did not receive a response from Yaffe that day; therefore, on March 11, 1996, Goldstein sent an identical memorandum to the Executive Committee.

Yaffe suspended Goldstein on March 15, 1996 for Goldstein's failure to abide by their agreement of January 19, 1996 that he would bring any problems to Yaffe before approaching the Executive Committee. Yaffe brought the suspension before the Executive Committee, charging that Goldstein violated Article V, Sections 2.2 and 2.4 of the Chestnut Ridge bylaws. These sections prohibit members from engaging in behavior detrimental to the good order of the company, and from making comments or engaging in behavior prejudicial to the good reputation, order, and discipline of the company.

Yaffe appointed three members of Chestnut Ridge to an Investigating Committee, which investigated the allegations against Goldstein. The Investigating Committee recommended to the Executive Committee that Goldstein be suspended for a period of 90 days. The Executive Committee voted to suspend Goldstein for 90 days on March 21, 1996. Goldstein

exercised his right under the bylaws to have the full company vote on the suspension. The full membership upheld the suspension, with defendant Michael Friedel voting against suspension.

In late May 1996, during his suspension from Chestnut Ridge, Goldstein taught a series of CPR classes. On May 20, 1996, Goldstein taught a CPR class in Woodlawn, off firehouse premises. Among those on the roster for the class that night was Eddie Ryan, a Chestnut Ridge member. Yaffe testified that Goldstein informed him by telephone that Ryan had taken the class on May 20. Goldstein denies making such a statement to Yaffe. Ryan was not at the CPR class on May 20, because he was seen on the video surveillance system at the firehouse at the time of the class. Yaffe also spoke to Ryan later and reported that Ryan told him he had not taken a CPR class since he had been in the Navy. Ross McCausland, another member of the Executive Committee, also recalled Ryan's statement that he had not had a CPR class since his Navy days.

The Executive Committee became aware that Goldstein may have falsified CPR records and made false statements to Executive Committee members regarding Ryan's attendance on May 20. Michael Friedel investigated the matter and filed charges against Goldstein. Yaffe then appointed an Investigating Committee composed of Ross McCausland, Harry Kakel, and Eugene Reynolds. Ryan advised the Investigating Committee that he had taken and passed a CPR test at Goldstein's house on May 22, 1996, not May 20, 1996. Goldstein wrote a letter to Friedel on August 11, 1996, explaining that he had taught three classes that week, one on May 20 and two on May 22. Goldstein

explained that he had simply made an error in writing Ryan's name on the roster for May 20 instead of May 22. The Investigating Committee recommended that the Executive Committee dismiss Goldstein from Chestnut Ridge membership.

On August 29, 1996, Goldstein faxed a letter signed by Eddie Ryan to the Executive Committee. The letter stated that Ryan's previous statements had been misconstrued, and that Ryan had in fact taken and passed the CPR test on May 22, 1996 at Goldstein's house. That same day, the Executive Committee voted to expel Goldstein from Chestnut Ridge membership, with Harry Kakel voting against expulsion. Goldstein did not appeal this decision to the full membership.

II.

Plaintiff assets that he was disciplined, suspended, and terminated by defendants for exercising his First Amendment rights to address matters of public concern in letters to the company regarding training and safety issues within Chestnut Ridge. Defendants argue that plaintiff was not suspended or terminated because of the content of his communications, but for other, non-protected reasons.

A case such as this requires that the court strike "a balance between the interests of the [employee], as a citizen, in commencing upon matters of public concern and the interest of the [public employer] in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Courts use a three-step analysis for claims like plaintiff's. See Daniels v. Quinn, 801 F.2d 687, 689 (4th Cir. 1986). First

the Court must determine, as a matter of law, whether plaintiff's statements concerned matters of legitimate public, rather than private, interest. See id.; see also Connick v. Myers, 461 U.S. 138, 145-48 (1983). If the Court determines that the statement involved a matter of public concern, then plaintiff must establish that he would not have been discharged "but for" his speech. Daniels, 801 F.2d at 687. To do so, plaintiff must come forth with sufficient facts to permit a determination that his statements were a substantial motivating factor in his dismissal. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Once plaintiff has done so, the burden shifts to defendant to come forward with enough facts to demonstrate, by a preponderance of the evidence, that plaintiff would have been fired even in the absence of his comments. Id. Finally, the Court must determine whether defendants' interest in maintaining internal order and carrying out the public mission of Chestnut Ridge outweighs the public interest in plaintiff's comments. Daniels, 801 F.2d at 689-90.

A.

Goldstein argues that he was suspended because of the series of letters he wrote from December 1995 through March 1996. These letters alerted President Yaffe and the Executive Committee to some allegedly unsafe procedures of Chestnut Ridge. Goldstein accused the Captain of Chestnut Ridge of failing to send sufficient qualified medical personnel on emergency calls, failing to ensure that the proper equipment was on the fire trucks for each emergency call, and inconsistently enforcing Chestnut Ridge's bylaws. Because Goldstein criticized the actions of public officials and questioned the propriety of actions taken by a governmental

entity, his letters involved a matter of public concern. See Connick, 461 U.S. at 147-49. Indeed, his letters addressed a matter of public safety, which is one of the most public concerns imaginable.

Thus Goldstein's letters did contain protected speech. The next question is whether expression of his protected comments constituted a substantial factor in defendants' decision to suspend him. Mt. Healthy, 429 U.S. at 287. This presents a close question, because it is not apparent whether plaintiff was suspended because of the content of his speech or the manner in which it was communicated. Several members of the Executive Committee testified in their depositions that plaintiff's "false allegations," "letters," and "accusations" were among the reasons they voted for suspension. On the other hand, most members of the Executive Committee also cited the disruptive nature of plaintiff's "nitpicking" and the "detractive manner" and tone of his letters. Two members noted Goldstein's failure to abide by his agreement with Yaffe to bring all problems to Yaffe before going to the Executive Committee.

Further complicating the situation is defendants' testimony that other members of the company felt unsafe working the Goldstein, and that Goldstein's behavior was "disruptive" and put the company in a "state of turmoil." Henry Kakel, one of the committee members, has testified on deposition that he linked plaintiff's letters to Goldstein's recent loss in the race for Captain of the company and that he believed that under the circumstances Goldstein's absence for a time would lessen the disruption.

In the final analysis it is virtually impossible to clearly delineate between the contents of Goldstein's letters and the manner in which he expressed himself. If the letters had resulted in Goldstein's immediate termination, I would deny defendants' summary judgment motion and leave it for the jury to determine what motivated their decision. However, I am persuaded that precisely because it is impossible to draw a precise line of demarcation and because defendants' action was the limited one of temporary suspension rather than dismissal, they are entitled to the summary judgment they seek.

Chestnut Ridge has a legitimate interest in maintaining an orderly and safe work environment. The maintenance of such an environment is itself essential to the public safety. Although Goldstein's safety concerns may have been legitimate - and Yaffe indicated that some of them were - the manner in which he raised them was so disruptive to Chestnut Ridge's operation that the Executive Committee felt it was necessary to suspend him for 90 days. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Connick, 461 U.S. at 151-52. Perhaps even more than other public entities, a fire company must have a cohesive work environment. The Executive Committee's response was proportionate to the harm that it reasonably perceived and therefore, in my judgment, was constitutionally justified under the circumstances.

B.

Goldstein argues that his dismissal from membership in August 1996 was also a result of his protected speech.

However, Goldstein does not offer any facts to show that his protected speech was a substantial motivating factor in his expulsion. Instead, Goldstein attempts to prove that the Executive Committee was mistaken in its conclusion that Goldstein falsified the CPR class records. Goldstein argues that summary judgment cannot be granted because there are factual disputes regarding the CPR class. However, such discrepancies are not ultimately material. All five members of the Executive Committee who voted in favor of expulsion testified that they voted to expel because of their belief that Goldstein had falsified documents. Even if defendants' belief that Goldstein falsified records was ultimately found to be incorrect, Goldstein was nonetheless expelled for action not protected by the First Amendment.[2]

For these reasons, defendants' motion for summary judgment is granted, and plaintiff's motion for partial summary judgment is denied. A separate order to that effect is being entered.

January 7, 1999
Date

/s/
J. Frederick Motz
United States District Judge

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[2] Of course, if the evidence upon which an employer discharged an employee was so weak as to give rise to the inference that it was pretextual, there would exist an issue of fact to be decided by the jury. That, however, is not the case here where there was sufficient evidence from which the members of the Executive Committee could properly find that Goldstein had falsified records.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed January 7, 1999]

No. JFM-96-1483

SCOTT GOLDSTEIN	)
Plaintiff,	)
	)
v.	)
	)
THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,	)
Defendants.	)

ORDER

For the reasons stated in the memorandum entered herewith, it is, this 7th day of January, 1999

ORDERED that

1. Defendants' motion for summary judgment is GRANTED; and

2. Plaintiff's motion for partial summary judgment is DENIED.

/s/_____

J. Frederick Motz
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Dated November 13, 1997]

No. JFM-96-1483

SCOTT GOLDSTEIN	)
Plaintiff,	)
	)
v.	)
	)
THE CHESTNUT RIDGE	)
VOLUNTEER FIRE COMPANY,	)
et al.,	)
Defendants.	)
	)

MEMORANDUM

Plaintiff, Scott Goldstein, has brought this action under 42 U.S.C. § 1983 against defendants The Chestnut Ridge Volunteer Fire Company and members of its Executive Committee (collectively "Chestnut Ridge" or "the Fire Company"). Plaintiff alleges that he was disciplined, suspended, and ultimately discharged for informing Chestnut Ridge that several of its members lacked necessary training and qualifications. Plaintiff claims that these actions violated his First Amendment rights.

Chestnut Ridge has moved for summary judgment on the ground that it is not a "state actor" under the Fourteenth Amendment so that its actions cannot be deemed to be "under color of state law" under section 1983. Goldstein has filed a cross motion for summary judgment on the same issue.

I.

The courts have derived three tests for determining if particular conduct by a private entity constitutes state action: (1) the symbiotic relationship test, (2) the regulation/public funding test, and (3) the public function test. See generally Conner v. Donnelly, 42 F.3d 220, 223-24 (4th Cir. 1994). In Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 215-16 (4th Cir. 1993), the Fourth Circuit ruled that the symbiotic relationship test applies only where a private entity is a lessee of public property, and that in Maryland volunteer fire departments are not so extensively regulated as to become state actors. Therefore, the question narrows to whether Chestnut Ridge can be deemed to be a state actor under the public function test.

In applying this test it is not sufficient merely to ask "whether a private group is serving a 'public function.' . . . the question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)). This question is not always easy to answer. As noted by the Fourth Circuit in Haavistola,

> [r]eview of the . . . precedents and decisions does little to simplify the issue of when a

> private entity assumes the role of state actor due to its involvement or provision of an exclusive public function. The cases inform the analysis in two ways: first, the determination is a factually intense analysis; and second, its outcome hinges on how a given state itself views the conduct of the function by the private entity.

6 F.3d at 218.

The district court in Haavistola had granted summary judgment for the defendant, finding that "nothing . . . indicates that firefighting has traditionally been the exclusive province of the State of Maryland." 812 F.Supp. 1396 n. 20. The Fourth Circuit reversed this ruling, holding that the district court had erred by making its determination "without any direct evidence as to how fire protection is conducted throughout the State" and in taking judicial notice "of the facts that many volunteer fire departments operate in Maryland without governmental intervention at all and that all volunteer fire departments operate in a gray area as to the function they provide." 6 F.3d at 218.

After remand a trial was conducted in Haavistola and the jury returned a verdict finding that the Community Fire Company of Rising Sun was not a state actor. The plaintiff did not take an appeal. Thereafter, the Fourth Circuit reversed and remanded for trial a decision I rendered in an earlier case brought against Chestnut Ridge in which I held that the Fire Company was a state actor as a matter of law. Goldstein v. Chestnut Ridge Volunteer Fire Co., 25 F.3d 1039, 1994 WL 233356 (4th Cir. 1994) ("Goldstein I"). In

a separate concurring opinion Chief Judge Wilkinson expressed his view that the state action issue should be resolved as a matter of law. Chief Judge Wilkinson further indicated that if the issue is to be treated as a question for the fact finder, the verdict reached by the Haavistola jury should be accorded respect and that "a significant burden should rest with any party seeking to depart from that [verdict]."[1] 1994 WL 233356 at * 4.

II.

For the reasons that follow I again find that Chestnut Ridge is a state actor as a matter of law. I realize that my ruling could be considered an obstinate refusal to follow the Fourth Circuit's precedent; I hope that it is not interpreted as such. I must confess that I do fully subscribe to Chief Judge Wilkinson's view that a myriad of considerations, including predictability, the absence of any underlying genuine disputes of fact, and proper regard for the respective roles of judges and juries, makes the state action issue one which is appropriate for resolution by summary judgment. Nonetheless, if the record in the present case was precisely the same as in Goldstein I, I would, of course, submit the issue to the jury. However, historical evidence which has been added to the record has further clarified the question and reinforced the conclusion I previously reached.[2]

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[1] The earlier case was instituted by Ivan Goldstein, the father of the plaintiff in the present action. The case was voluntarily dismissed by the plaintiff after remand.

[2] I should add that I feel somewhat responsible personally for having contributed to the perplexing current state of the law.

III.

A.

Chestnut Ridge is a non-profit corporation operating under its own constitution and bylaws. It owns the land and building from which it operates as well as all of the engines, hoses, and related equipment it employs in fire suppression and rescue activities. It elects its own officers and directors. Those officers are charged with the duty of maintaining discipline and taking personnel actions necessary for the preservation of good order and morale within the company.

Career and volunteer fire companies in Baltimore County are dispatched to fire scenes by a central county dispatcher. The factors considered by the dispatcher in determining whom to call are the location and severity of the fire or emergency event. At the fire scene, volunteer fire companies are sometimes in command over career fire companies, while on other occasions career and volunteer fire companies share command at the scene.

In Goldstein I I wrote only a letter opinion, summarily stating my conclusion that firefighting is a public function. I did not give the issue the careful treatment it deserves. In any event, if I have not been faithful to Fourth Circuit precedent, my waywardness should be promptly corrected. Accordingly, in the order accompanying this opinion, I expressly state (so that Chestnut Ridge may seek an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)) that my ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

Chestnut Ridge (like all volunteer fire companies in Baltimore County) is a member of the Baltimore County Volunteer Fire Association ("BCVFA"). The BCVFA requires that volunteer firefighters have certain types of certification and/or training before they fight a fire in the county. These are the same types of certification and training that the Baltimore County Fire Department requires of its career firefighters. If a volunteer fire company's members fail to meet those requirements, the volunteer company will be suspended from the BCVFA. If the volunteer fire company is suspended, the Baltimore County Fire Department will take the volunteer fire company off its dispatch system and will not dispatch that volunteer fire company to fight any fires in the county.

B.

Article 38A, section 7 of the Maryland Code establishes the Office of the Fire Marshal, whose responsibilities include "the establishment and enforcement of fire safety practices throughout the State, preventive inspection and correction activities, coordination of fire safety programs with volunteer and paid fire companies, and other State agencies and political subdivisions exercising enforcement aspects, and critical analysis and evaluation of Maryland fire loss statistics for determination of problems and solutions." Md. Ann. Code art. 38A, § 7(b) (1997). In addition, the Maryland State Firemen's Association, a state-funded association, conducts annual inspections of all fire and rescue apparatus, equipment, and facilities. Md. Ann. Code art. 38A, § 46B.

State-funded training is required for volunteer fire company members, and is conducted by the Maryland Fire and Rescue Institute at the University of Maryland, a state institution. Md. Code Ann., Educ. § 13-103 (1997). Volunteer fire companies and their personnel are immune from civil liability for acts taken in the performance of their duties. Md. Code Ann., Cts. & Jud. Proc. §§ 5-309, 5-309.1 (1995). Chestnut Ridge's ambulance service is required to be licensed under section 13-515 of Maryland's education code. State grants and loans to volunteer fire companies, including Chestnut Ridge, are made through the Emergency Assistance Trust Fund and approved and monitored by State agencies. Md. Ann. Code art. 38A, § 46A.

Volunteer fire departments, including Chestnut Ridge, receive significant portions of their operating revenue from the State of Maryland. For example, Chestnut receives State funding that is appropriated by the State to promote:

> (1) The delivery of effective and high quality fire protection, rescue, and ambulance services to the citizens of this State;
>
> (2) Increased financial support for fire, rescue, and ambulance companies by local governments; and
>
> (3) The continued financial viability of volunteer fire, rescue, and ambulance companies given the greatly increased costs of apparatus and other types of equipment.

Md. Ann. Code art. 38A, § 45B. Payments under this statute are made to each county for distribution to fire companies for the purchase of equipment and rehabilitation of facilities. Id. Funds distributed to fire companies under this statute are conditioned upon compliance with a requirement that they be audited and copies of the account be submitted to a State agency. Md. Ann. Code art. 38A, §§ 45C-D. Chestnut Ridge receives operating revenue from the State and Baltimore County governments, and uses these funds for items such as insurance, utilities and fuel.

Under Maryland and Baltimore County law, grants and loans are also provided for volunteer fire companies. See, e.g., Baltimore County Code §§ 15-161 et seq. (1988). Members of volunteer fire companies are covered under State and county benefit plans. See, e.g., Md. Ann. Code art. 38A, §§ 42-42B (disability benefits); Md. Code Ann., Lab. & Empl. § 9-234 (1991 & Supp. 1996) (workers' compensation); Md. Ann. Code art. 48A, § 425 (1994) (group life insurance); Baltimore County Code § 23-147 (pensions). Volunteer firefighters are considered on duty for purposes of the Public Safety Officer's Benefit Act. Md. Ann. Code art. 38A, § 45. Volunteer fire companies and firefighters receive several tax benefits and exemptions, see, e.g., Md. Code Ann., Tax-Prop. § 7-209 (1994), and are exempt from paying State and county fees that other private corporations are required to pay. Md. Code Ann., Corps. & Ass'ns § 1-203.1 (1993).

IV.

A.

Although the foregoing facts demonstrate that in Maryland volunteer fire departments are extensively regulated by the State and that they and their members receive substantial financial benefits from the State, these facts alone clearly would not entitle me to hold that Chestnut Ridge is a state actor. Virtually the same facts were before the Fourth Circuit in Haavistola and Goldstein I when the court remanded the cases for trial on the state action issue.

The factor that I now find decisively tips the balance in favor of finding that Chestnut is a state actor is the existence of two Maryland statutes which confer inherently sovereign powers upon volunteer firefighters. Under Article 48, section 181(a), volunteer fire companies are given the authority to enter buildings where a fire is in progress, to order any person to leave the building, to order caravans of vehicles, crafts or railway cars to be detached, and to maintain order in the vicinity of a fire or other emergency.[3] Likewise, members of volunteer fire companies may be appointed "fire police" with the powers of deputy sheriffs, including the power to arrest, while at fires and on their way to and from fires. Maryland Ann. Code art. 87, § 49 et seq. (1991 & Supp.1994).

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[3] An individual who obstructs a fire investigation or refuses to remove combustible materials is subject to criminal penalties. Maryland Ann. Code art. 48, §§ 181(b), 182 and 183.

Can there be any doubt that the exercise of the powers to enter buildings, order persons to leave buildings, make arrests, and commandeer private vehicles is "traditionally the exclusive prerogative of the State?" Rendell-Baker v. Kohn, 457 U.S. at 842. Indeed, to the extent that it is not sanctioned by the State, the performance of such acts would be a crime. Could there be any more clearly definitive guiding line?[4]

B.

The parties in the present case have placed in the record more historical information than was presented in Goldstein I. The information is of interest. Goldstein has submitted a report and affidavit from Whitman Hawley Ridgway, a tenured history professor at the University of Maryland, in which Professor Ridgway concludes "within a reasonable degree of Maryland historical certainty and probability that fire fighting was traditionally an exclusive public function in Baltimore County, Maryland." Professor Ridgway supports his opinion by reference to various historical facts. First, prior to 1881 organized fire protection in the most populous area of Baltimore County, known as "the Belt," had (with one exception) depended upon the services of Baltimore City units from contiguous areas. Second, in 1881

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[4] The Second Circuit, in Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17 (2d Cir. 1979), also recognized the importance of this conferral of power upon volunteer firefighters. In concluding that a Connecticut volunteer fire department was a state actor, the court relied in part on several statutes that "grant[ed] to volunteer firemen certain powers traditionally associated with sovereignty," including the power to maintain order at fire scenes. Id. at 24.

the Baltimore County Fire Department was established. Third, the Waverly Fire Company, the exception just noted, which had been created in 1878 when the county financed the construction of its building and the purchase of its fire equipment, turned over its property to the county's Fire Commissioner when the County Fire Department was established in 1881. Finally, in the years after its establishment the County Fire Department rapidly grew.

Although Chestnut Ridge has not come forward with historical testimony opposing the opinion of Professor Ridgway, I do not find the professor's opinion to be dispositive. He has not presented any evidence discussing firefighting practices in the county prior to 1881 beyond the area known as the Belt. Moreover, one of the works upon which Professor Ridgway relies, a history of firefighting in Baltimore County, documents that after the turn of the century, "while the growth of the county's paid department slowed, volunteer fire companies were enjoying a boom period." Betsy Weaver & Gary E. Frederick, Hands, Horses and Engines 35 (1982). Over fifteen volunteer companies were formed soon after the turn of the century. Id. at 35-44.

On its face this evidence not only seems to contradict to some extent Professor Ridgway's conclusion, it could be viewed as definitively establishing that in Baltimore County firefighting has not traditionally been the exclusive prerogative of the State. Over time, however, there have been other developments, statutory in nature, which (although not referred to by Professor Ridgway) are of significant historical importance. In 1922, members of Baltimore County fire companies, both volunteer and paid, were authorized to be appointed deputy sheriffs. Act of Apr. 13, 1992, ch. 414,

1922 Md. Laws 907. The firefighters were to exercise their deputy powers both at fires and on route to and from fire calls. This statute was later extended to firefighters in other Maryland counties and its present version is, as recited above, found at Md. Ann. Code art. 87, § 49 et seq. Further, in 1973, volunteer fire companies in Baltimore County were granted "peacekeeping" authority to enter buildings to fight fires and to maintain order at fire scenes. Act of April 26, 1973, ch. 73, 1973 Md. Laws 134. This statutory authority is, as recited above, now located in Md. Ann. Code art. 48, § 181(a).[5] Since it is the possession and exercise of these powers that I find to be the traditional prerogatives of the State, whatever the status of volunteer fire companies in

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[5] There are interesting anomalies in the legislative history of the statutes defining the powers of Maryland's volunteer firefighters. In 1929, volunteer fire companies throughout the state, except Baltimore County, were granted the power to conduct inspections for fire hazards. Act of Apr. 11, 1929, ch. 260, 1929 Md. Laws 780. Even today the Baltimore County Fire Department has exclusive authority within the county to conduct such inspections although volunteer fire companies throughout the rest of the state have retained that power in their jurisdictions. Md. Ann. Code art. 38A, § 181(a). Likewise, some of the "peacekeeping" powers that were not granted to volunteer fire companies in Baltimore County until 1973 were conferred upon volunteer fire companies throughout the remainder of the state in 1951. Act of Apr. 13, 1951, ch. 372, 1951 Md. Laws 1119. In contrast, the authorization granted in 1922 to members of Baltimore County volunteer fire companies to be appointed deputy sheriffs was only extended to other firefighters in the state starting in 1945. See, e.g., Act of Mar. 24, 1945, ch. 375, 1945 Md. Laws 346 (Washington County). None of these anomalies affect the conclusion I have reached.

Baltimore County may have been prior to 1922 or 1973, I am of the firm opinion that they are now state actors.

C.

In reaching the conclusion that I have I am acutely aware of the care with which courts have circumscribed the state action doctrine. For example, the Supreme Court has held that a utilities company, a nursing home and a private secondary school are not state actors. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Similarly, the Fourth Circuit has held that a private, non-profit corporation that organizes and promotes an annual municipal festival is not a state actor. See United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995). The caution reflected in these opinions is entirely appropriate. The line between public and private activity cannot be clearly defined and, if promiscuously applied, the public function test could encompass within section 1983 and the Fourteenth Amendment various activities conducted by private entities, including education and health care, which, although proper subjects of regulation and funding, traditionally have not been solely within the province of the State.

Firefighting, however, is an activity of an entirely different nature. No reasonable person living in today's society would suggest that providing protection from fire, at least in a populated urban or suburban setting, has not become one of the fundamental responsibilities of government, which requires for its proper performance the conferral of the most fundamental police powers upon firefighters. While that

responsibility may be delegated, the body politic would not permit it to be devolved to private enterprises. As one thoughtful commentator has noted, if the public function test excludes volunteer fire companies from the category of persons who are deemed to be state actors, the test requires reformulation or recasting. See Ronald J. Krotoszynski, Back To The Briarpatch: An Argument In Favor Of Constitutional Meta-Analysis In State Action Determinations, 94 Mich. L.Rev. 302, 328-32 (1995). Perhaps purists will reach the conclusion that this is what is necessary. A far easier solution is for the courts simply to apply the existing test in a sensible manner.

V.

There is a remaining issue to be considered. In Blum v. Yaretsky, 457 U.S. at 1011-12, the Court, after rejecting the contention that the defendant, a nursing home, provided a public function, went on to state:

> Even if respondents' characterization of the State's duties were correct, however, it would not follow that decisions made in the day-to-day administration of a nursing home are the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. Indeed, respondents make no such claim, nor could they.

Under this reasoning a private party could be considered a state actor for those decisions that directly affect the public, yet escape liability under § 1983 for internal administrative decisions.

There has been surprisingly little discussion of Blum's statement in subsequent cases.[6] Several Fourth Circuit cases have mentioned this aspect of the decision, however, providing some insight into its potential effect on state action analysis. In Hicks v. Southern Maryland Health Systems Agency, 737 F.2d 399, 402 (4th Cir. 1984), the court, in rejecting a finding of state action under a public function theory, stated that "the court in Blum restricted its application to cases where the state traditionally and exclusively had assumed day-to-day administration." More recently, in Gaston Festivals the court cited Blum's language while discussing what constitutes a governmental decision covered by section 1983. 43 F.3d at 911. Perhaps most importantly, however, in Haavistola the court, in describing the parameters of the public function analysis, stated that Blum "suggested that the analysis should involve review of the alleged misconduct, and not just the overall function of the alleged state actor." 6 F.3d at 216.

In at least one other case, however, the Fourth Circuit has seemingly rejected applying Blum's reasoning in this sort of situation. In Andrews v. Federal Home Loan Bank of

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[6] There has also been little academic commentary on the subject. In one of the few discussions of the issue, one commentator noted that "the Blum decision for the first time specifically couched the public function test in nexus terms. Such language may indicate that the public function test now requires not only scrutiny of the precise nature of the activity being challenged, but also some nexus between the state and that activity." Ronna G. Schneider, The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change, 60 Notre Dame L.Rev. 1150, 1176-77 (1985).

Atlanta, 998 F.2d 214, 216 (4th Cir. 1993), the plaintiff was terminated as a field examiner for the defendant. Plaintiff filed suit, alleging that he was fired for criticizing a change in the defendant's asset-classification policy, in violation of the First Amendment. Id. In considering whether the defendant was performing a public function, the court stated:

> The district court identified personnel decisions as the function at issue. It then held personnel decisions not to constitute a public function. While we would not differ with that characterization, we think that the Bank's status as a governmental entity is what the parties contest for purposes of state action doctrine. If the Bank were held to be performing a public function for purposes of state action doctrine, then it would be difficult to conclude that personnel decisions reached during the performance of that public function were not subject to constitutional strictures.

Id. at 219 n. 1. Thus, unlike the "piecemeal" approach to state action analysis seemingly endorsed by Blum, in Andrews the court adhered to a "unified" approach, in which even internal administrative decisions made by a private party can give rise to section 1983 liability, if the party performs a public function.

In my judgment the dictum in Blum is sound. Even if a defendant is deemed to be a state actor, a second inquiry should be made as to whether the conduct at issue in the litigation peculiarly relates to the defendant's performance of a public function. Under this approach a routine employment

decision, alleged to have been motivated by unlawful discriminatory animus (such as the decisions involved in Haavistola and Goldstein I), would not be actionable under section 1983 (although it would, of course, be actionable under other anti-discrimination statutes, such as Title VII, the Age Discrimination in Employment Act, and, where it applies, section 1981).

That limiting doctrine is of no help to Chestnut Ridge in this case, however. Plaintiff alleges that he was disciplined, suspended, and terminated for informing Chestnut Ridge that several of its members lacked necessary training and qualifications. Clearly, these alleged communications directly related to the public function which Chestnut Ridge performs. Accordingly, adverse employment actions taken in reaction to them fall within the purview of section 1983.

A separate order effecting the rulings made in this memorandum is being entered herewith.

Date: November 13, 1997 /s/_____
J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Dated November 13, 1997]

No. JFM-96-1483

SCOTT GOLDSTEIN
Plaintiff,

v.

THE CHESTNUT RIDGE VOLUNTEER FIRE COMPANY, et al.,
Defendants.

ORDER

For the reasons stated in the memorandum entered herein on August 21, 1997 and in the memorandum to counsel being entered herewith, it is, this 13th day of November 1997

ORDERED

1. Defendants' motion for summary judgment is denied;

2. Plaintiff's motion for summary judgment is denied on the ground that ultimate resolution of the cognizability of this action under 42 U.S.C. § 1983 will turn

upon the merits of the reasons that plaintiff was disciplined, suspended, and terminated;

3. Defendants' motion to alter or amend judgment is granted in part and denied in part; and

4. Pursuant to 28 U.S.C. § 1292(b), I state, so that the defendants may, if they choose, seek to take an interlocutory appeal, that I am of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/_____
J. Frederick Motz
United States District Judge